

A
PRACTICAL TREATISE
ON THE
LAW OF SLAVERY.
BEING A
COMPILATION
OF ALL THE
DECISIONS MADE ON THAT SUBJECT,
IN THE
SEVERAL COURTS OF THE UNITED STATES,
AND
STATE COURTS.

WITH COPIOUS NOTES AND REFERENCES
TO THE
STATUTES AND OTHER AUTHORITIES,
SYSTEMATICALLY ARRANGED.

By JACOB D. WHEELER Esq.
COUNSELLOR AT LAW.

NEW YORK:
ALLAN POLLOCK, J. R.
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ENTERED according to the Act of Congress, in the year 1837,
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RECOMMENDATIONS.

From the Hon. Judge Hitchcock of Alabama.

New York, 18th March, 1837.

ALLAN POLLOCK, JR. Esq.

SIR:—I have given a cursory perusal (all that my time would allow,) to the work, entitled "A Practical Treatise on the Law of Slavery," upon which you have requested my opinion.

As an abstract of the decisions to be found in the American Reports, upon that subject, arranged under convenient heads, I have no doubt it will be a valuable work for the use of the members, particularly of the Southern Bar of the United States.

Respectfully, your obdt. servt.

H. HITCHCOCK.

From the New York Mercantile Advertiser.

Slavery.—The proof sheets of a new work on this subject, which will be published next week by Mr. Pollock, 92 Fulton street, have been submitted to us. It is a compilation of all the decisions made on that subject in the several Courts of the United States, and State Courts, with copious notes and references to the statutes and other authorities, systematically arranged,—1 vol. 500 pages 8vo.—From a recommendation of the Hon. Judge Hitchcock, of Alabama, we have no doubt of its accuracy and usefulness, especially to the southern bar; and at this particular time, a work of considerable interest at the north. It is rarely we take up a book that is its equal in point of printing and paper, and it reflects great credit on Messrs. Craighead and Allen, who are the printers. It will stand a comparison with the best London publications, and we should be glad to see all other publishers pursue the same course in getting up their works that Mr. Pollock has done.

From the New York Star.

Work on Slavery.—A most important work is nearly ready for publication, and will be issued next week by Mr. Pollock, 92 Fulton street. It is a compilation of all the decisions made on the subject of slavery by the several Courts of the United States and State Courts, with copious notes, indexes, &c. &c. by J. D. Wheeler, Esq. and very elegantly printed by Craighead & Allen. At this crisis we should say such a work is of great interest and value, and should have a great circulation in the Southern States, as well as those States in which the question is agitating.

ALLAN POLLOCK, JR.

LAW PUBLISHER, 92 FULTON STREET, NEW YORK.

Can furnish the following work, by the single copy, or wholesale—viz :

A PRACTICAL ABRIDGEMENT of AMERICAN COMMON LAW CASES, argued and determined in the Courts of the several states, and the United States Courts, from the earliest period to the present time ; alphabetically arranged ; with Notes and References to the Statutes of each State, and analogous Adjudications—Comprising under the several titles, a Practical Treatise on the different branches of the Common Law.—By J. D. WHEELER, Esq. Counselor at Law. 8 vols. royal octavo—price \$6 per vol. in calf extra.

Among the letters received commendatory of this Abridgement, are the following from *Chancellor Kent* and *Chief Justice Marshall*.

SIR :—I have curiously looked over the first volume of *Wheeler's Practical Abridgement of Common Law Cases*, which you were so obliging as to send me. As far as I have had time to examine the work, I have found it ably and accurately executed. The rapid multiplication of American Reports, suggests the necessity and value of such an undertaking, and when it shall be completed, in the manner and style it has commenced, it will, and ought to become, an indispensable part of a Lawyer's Library. I wish the Editor and publishers of the Abridgement, the utmost patronage and success. Your's respectfully, JAMES KENT.

From Chief Justice Marshall, dated Richmond, April 16, 1834.

SIR :—I received your letter of the 21st March, accompanying the first volume of *Wheeler's Practical Abridgement of American Common Law Cases*, which I have read rapidly. The plan is well adapted to the object of the writer, which is certainly a valuable one, to furnish the profession with some information respecting the decisions and peculiar statutory provisions of the different States which compose our great Republic. Reports have multiplied so enormously, that they can be collected only in public libraries, or in those of the wealthy and curious : this interesting communication, therefore, can be communicated only by means of Abridgements, or Treatises, such as *Story's Conflict of Laws*. The plan on which Mr. Wheeler has executed his abridgement, appears to me judicious ; he has presented with the necessary brevity, the very point decided in the words of the Court. To speak positively on the accuracy of the selections, would require an intimate knowledge with the Reports themselves, to which I have no pretensions ; but so far as I am acquainted with them, I am satisfied in his fidelity.

Very respectfully,

JOHN MARSHALL.

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A

PRACTICAL TREATISE

ON

THE LAW OF SLAVERY.

I. DEFINITION AND NATURE OF.*

1.

CLARK v. M'DONALD. June T. 1827. 4 M'Cord's Rep. 223.

THE action was brought against the defendant, as a common carrier, to recover the value of a negro woman and her child, who were passengers on board the defendant's boat from Charleston to George Town. The boat came to an anchor at night at one of the inland creeks between those places, and at the ebb of the tide the boat filled, and the slave and her child were lost. The captain used all necessary diligence, and had a pilot on board. The judge charged the jury, that there was no difference in the liability of the defendant, as captain of a steam-boat, for the loss of the slaves, than for the loss of bales of goods. Verdict for plaintiff. Motion for a new trial.

There is a distinction between the liability of a carrier of a slave and a bale of goods—slaves being considered as human beings.

The Court. Johnson, J., held there must be a new trial ; that there was a distinction between the liability of the carrier in the transportation of a slave and a bale of goods ; that the slave was a human being, and the carrier could not control the operations of her mind, or her physical action. She might will her own destruction, or she might escape. And his honor, after referring to the cases

* The definition of a slave by the Civil Code of Louisiana is thus given: "A slave is one who is in the power of a master to whom he belongs." Civil Code, art. 35, and 173.

of *Rutherford v. M'Gowan*, 1 Nott & M'Cord, p. 17.; *Cook v. Gourdin*, 2 Nott & M'Cord, p. 19.; and *Miles v. Johnson*, 1 Nott & M'C., 157., which he contended was not analogous, observed, that the question ought to have been left to the jury, whether the accident happened by the negligence of the carrier, or the act of the slave, or by inevitable accident.

2.

STATE V. THOMPSON. Sept. 1807. 2 Overton's Rep. 96.

Capable of
volition.

Held by the Court, *Overton, J.*, that where the defendant forcibly took a negro woman from the possession of another, under a claim of property, an indictment would lie against him. Slaves differ from all other property: they have reason and volition. Where a slave is in the possession, or in the ordinary employment of a person, and another takes such slave away, it should not be matter of inquiry in this court whether the negro was willing to go or not.

3.

WALDON'S EX'R V. PAYNE. Fall T., 1794. 2 Wash. Rep., 1. 8.

HAWKIN'S ADM'R. V. CRAIG, 6 Monroe's Rep. 254.

And they
are consid-
ered chat-
tels.

Per Cur. Slaves, from their nature, are chattels, and were put in the hands of executors before the act of 1792, declaring them to be personal estate.

4.

BEATLY V. JUDY, ET AL. Spring T., 1833. 1 Dana's Rep. 101.

PLUMPTON V. COOK, 2 Marshall's Rep. 450.

So they are
considered
personal
estate.

Per Cur. The phrase "personal estate," in wills and contracts, should be construed as embracing slaves.

5.

M'DOWELL'S ADM'X V. LAWLESS. Oct. T. 1827. 6 Monroe's Rep.

141. DADE V. ALEXANDER, 1 Wash. Rep. 30. WALDEN V.

PAYNE, 2 Wash. Rep., 1. DUNN AND WIFE V. BRAY, 1

Call, 338. CHINN AND WIFE V. RESPASS, 1 Monroe's

Rep. 23.

And are for
many pur-
poses real
estate.

Per Cur. Slaves were declared by law to be real estate, and descend to the heir at law. They are considered real estate in the case of descents.

6.

HUDGINS v. WRIGHTS. NOV. 1806. 1 Hen. & Munf. 134.

Per Cur. Tucker, J. From the first settlement of the colony ^{Who are} of Virginia to the year 1778 Oct. sess., all negroes, Moors, and mulattoes, except Turks and Moors in amity with Great Britain, brought into this country by sea or by land, were slaves, and by the uniform declaration of our laws, the descendants of *females* remain slaves to this day, unless they can prove a right to freedom by actual emancipation, or by descent in maternal line from an emancipated female. See the case *ex parte Ferrett*, 1 Rep. Const. Court of South Carolina, p. 194. where the court held, that an East Indian, though "a person of color," is not liable to be taxed under the ordinance of the city council of Charleston, imposing a duty on "each free negro, or person of color, whether a descendant of a negro or otherwise."

7.

HUDGINS v. WRIGHTS. NOV. 1806. 1 Hen. & Munf. 134.

Held by the court, *Green J.*, that to solve all doubts, the act of 1662 was passed, which declared, that all children born in this country shall be bond or free, according to the condition of the mother. It is the rule of the civil law. By that law the civil state of the child was determined by that of the mother at the time of the birth. ^{The rule *partus sequitur ventrem* obtains in this country. *}

* This rule of the Civil Law prevails in all the states, and in many of them statutes have been enacted upon the subject. See act of 1740, South Carolina, 2 Brevard's Dig. 229. And in Georgia, by the act of 1770, Prince's Dig. 446. And by the Rev. Code of Mississippi, 369. Rev. Code of Virginia, vol. 1. p. 421. Civil Code of Louisiana, art. 183. And the same rule, that slaves follow the condition of the mother, obtains in the West Indies. Edward's West Indies, book 4. ch. 1. This rule was broken in upon in Maryland by an act passed in the year 1663, ch. 30, which establishes the common law doctrine, *partus sequitur patrem*. See the cases of *Butler v. Craig*, 2 Harris & M'Hen. 214. and *Butler v. Boardman*, 1 Har. & M'Hen. 371. The law was, however, changed by the act of 1715, which restored the maxim of the civil law, *partus sequitur ventrem*.

8.

STATE V. DAVIS AND HANNA, Dec. T. 1831. 2 Bailey's Rep. 558.

Definition
as to the
term mul-
latto.

The defendants were indicted under the bastardy act, and on the mother's being called as a witness, it was objected that she was a mulatto ; but the jury found them white women. The defendants were convicted, and moved to set aside the verdict, on the ground of misdirection in the charge of the court.

The court observed that the term mulatto, as used in this state, was vague, and signified, in general, a person of mixed white and negro blood, in whatever proportions it might be mingled. The various distinctions which have obtained in the French and Spanish American colonies has not been adopted in this state.

Harper J., in delivering the opinion of the court, observed, that it seemed to be an error in the judge's charge to the jury, in stating, that " a mulatto was the offspring of parents, one of whom was white, and the other black," and that he " was disposed to think, that where the white blood predominated, the disqualification ought not to attach." According to this instruction, we understand, that the child of a quadroon and a mulatto, according to the distinction in Louisiana, must be accounted white. Yet, I suppose, that even in Louisiana such a person would be called a mulatto. It is certainly true, as laid down by the presiding judge, that " every admixture of African blood with the European, or white, is not to be referred to the degraded class." It would be dangerous and cruel to subject to this disqualification a person bearing all the features of a white, on account of some remote admixture of negro blood ; nor has the term mulatto, or person of color, I believe, been popularly attributed to such person. The shades are infinite, and it is difficult to fix a limit. I do not know that we can lay down any other rule than to give what appears to be the popular meaning of the word : to wit, that where there is a distinct and visible admixture of negro blood, the person is to be denominated a mulatto, or person of color. It is a question for the jury. In determining it, they may have the evidence of inspection as to color, and the peculiar negro features ; the evidence of reputation, as to parentage ; and such evidence as was offered in the present case, of the person having been received in society, and exercised the privilege of a white man.

9.

THE STATE V. MARY HAYES. June T. 1829. 1 Bailey's Rep.

The prisoner was indicted and convicted of keeping a disorderly house. And may be known by inspection.*

When brought up for sentence, O'Neal, J., decided, that the offspring of a white mother and a negro father is a "mulatto," within the meaning of the statute of 1740, and can be punished only by the tribunal specified by the statute. And if a mulatto be convicted in a court of sessions, the judge may, on inspection, refuse to pass sentence, and turn over the prisoner to a court of magistrates and freeholders.

10.

MARIA ET AL. V. SURBAUGH. FEB. T. 1825. 2 Rand. Rep. 228. ; NEGRO MARY V. THE VESTRY OF WILLIAM AND MARY'S PARISH, 3 Har & M'Hen. Rep. 501. ; DAVIS V. CURRY, 2 Bibb's Rep. 238. ; 2 Haywood's Rep. 170. ; MAHONY V. ASHTON, 4 Har & M'Hen. 305. ; GOBU V. GOBU, 1 Taylor's Rep. 114. ; GOBU V. GOBU, 2 Hayn's Rep. 170. ; DAVIS V. CURRY, 2 Bibb's Rep. 238. ; GIBBONS V. MORSE, 3 Halst. Rep. 253. ; HALL V. MULLIN, 5 Har. & Johns. Rep. 190. ; TRONGOT V. BYERS, 5 Cowen's Rep. 480.

Per Cur. Green, J. Negro slaves were introduced in Virginia in 1620. They were always held as property, and the children of female slaves were always held as slaves. Every negro is presumed to be a slave.*

11.

DAVIS (a man of color) V. CURRY. Fall. T. 1810. 2 Bibb's Rep. 238.

Suit for freedom. The defendant relied on possession of the plaintiff as a slave from the year 1789 ; and on the presumption of Or person of color.

* In the Spanish and French West Indies, the following grades are distinguished : The first grade is that of the mulatto, which is the intermixture of a white person with a negro ; the second are the *tercerones*, which are the production of a white person and a mulatto ; the third grade are the *quarterones*, being the issue of a white person and a *tercerone* ; and the last are the *quinterones*, being the issue of a white person and a *quarterone*. Beyond this there is no degradation of color, not being distinguishable from white persons, either by color or feature. Edwards' West Indies, book 4. ch. 1. Stephens' Slavery of the West India Colonies Delineated, p. 27.

* This is the general doctrine in all the states, and the application of a different rule is only in cases where the person is a mulatto, or some other grade approximating to a white person. See post, title "Evidence," in actions for freedom.

slavery arising from color, as being sufficient evidence of title in him, to put the plaintiff on proof of his freedom. And of this opinion was the court, and the plaintiff excepted.

Per Cur. Boyle, Ch. J. The question admits of but little doubt. Color and long possession are such presumptive evidences of slavery, as to throw the burden of proof on the party claiming his freedom.

12.

BRANDON ET. AL. V. PLANTERS' AND MERCHANTS' BANK OF HUNTSVILLE. Jan. T. 1828. 1 Stewart's Rep. 320. S. P. BYNUM v. BOSWICK, 4 Dessaus. 266.

They cannot acquire or possess property.

Trover for bank notes found by the plaintiff's negro. It appeared by the testimony of witnesses, that they were standing near the engine house at the public square in Huntsville, when the negro boy was cutting wood near, and heard him exclaim he had found money, and saw the boy raising the bundle. The boy delivered the bundle to Brown, one of the witnesses, who took it to the bank. The plaintiff demanded the money of the bank, which was refused, and this action was commenced. The defendants demurred to the declaration of the plaintiffs.

The court held, that the action would lie ; and that the possession of the slave, by finding, is the possession of the master, and if it be taken from the slave by any person other than the true owner, the master may receive it.

Per Cur. Saffold, J. Our slaves can do nothing in their own right ; can hold no property ; can neither buy, sell, barter, or dispose of any thing, without express permission from the master or overseer ; so that every thing that they can possess or do is, in legal contemplation, on the authority of the master.

Per Crenshaw, J. A slave is in absolute bondage ; he has no civil right, and can hold no property, except at the will and pleasure of his master ; and his master is his guardian and protector ; and all his rights and acquisitions and services are in the hands of his master. A slave is a rational being, endowed with volition and understanding like the rest of mankind, and whatever he lawfully acquires, and gains possession of, by finding, or otherwise, is the acquirement and possession of the master. A slave cannot take

property by descent or purchase.* And see *HALL v. MULLEN*, 5 Har. & Johns. 190. Where the court held, that no legal contract whatever could be made with a slave without the consent of his master. And in *JACKSON, ex. dem. THE PEOPLE, v. LERVEY*, 5 Cowen's Rep. 397., the court held, that a slave at common law could not contract matrimony, nor could the child of a slave take by descent or purchase.

13.

STATE v. CECIL. Spring T. 1812. 2 Martin's Louisiana Rep. 208.; *GOBU v. GOBU*. 1 Taylor's Rep. 164.

A woman of color was offered as a witness by the attorney general; and a gentleman swore that she was once a slave, but he had liberated her. She had a copy of the act of liberation; but the original of which was in New-York. The council for the prisoner insisted that the court ought not to look at the copy, while the original is admitted to exist. Colored persons are presumed free, in certain cases.

Per Cur. The woman being of color, the presumption is that she was free born. *ADELE v. BEAUREGARD*, 1 Martin, 183. But this presumption is destroyed by the declaration of her former master. This declaration, however, must be taken *in toto*; and it

* By the Civil Code of Louisiana, art 175., it is declared, that "all that a slave possesses belongs to his master; he possesses nothing of his own, except his peculium, that is to say, the sum of money or moveable estate, which his master chooses he should possess." "Slaves are incapable of inheriting or transmitting property." Art 945. "Slaves cannot dispose of, or receive by donation, *intervivos*, or *mortis causa*, unless they have been previously and expressly enfranchised conformably to law, or unless they are expressly enfranchised by the act by which the donation is made to them." Art 1462. The earnings of slaves and the price of their services belong to their owners, who have their action to recover the amount from those who have employed them. Code of Practice, art 103. These principles prevail in all the states, and are taken from the civil law, and were adopted in all except Connecticut, and perhaps Massachusetts. Massachusetts' Historical Collections, vol. 4. p. 194. Dane's Abr. ch. 46. art. 2. Reeves' Domestic Relations, 340.; Bancroft's History, vol. 1. p. 187.; 2 Kent's Com. 252. They are far more rigorous than the Spanish and Portuguese laws applied to slaves in their colonies; for by their laws a slave may acquire money or property by his labor, at periods set apart for his own use and benefit, and the law will protect him in the possession of it. Stevens on Slavery, p. 59, 60. Wrexall's Memoirs, vol. 2. letter 21. Stroud's Sketch of the Laws relating to Slavery, p. 46. The legislative enactments in the several states, prohibiting the slave from acquiring or holding property, or hiring himself, &c., may be found in the following references: In South Carolina, James' Dig. 385. In Georgia, Prince's, Dig. 453.; in Kentucky, 2 Litt. & Swi. Dig. 1150.; 1 Rev Code of Virginia, 374.; Mississippi Rev. Code, 375; Laws of Tennessee, Oct. 23, 1813. ch. 135.; in North Carolina, Haywood's Manual, 526.; Rev. Stat. of Missouri, p. 581.

establishes her emancipation in the same breath. Neither are we ready to say, that when, in the trial of a cause, a fact comes incidentally and collaterally to be proved, the rules of evidence are as strictly to be insisted on, as when the fact put in issue is to be made out. In the latter case the party has previous notice, and time to procure the best testimony, which, consequently, will be required. Not so in the former case, as on a motion for a new trial, or for a continuance, when a witness is examined on his *voir dire*. Witness sworn,

II. ORIGIN AND HISTORY OF.*

1.

SEVILLE V. CHRETIEN. Sept. T. 1817. 5 Martin's Louisiana Rep. 275.

Origin and history of. *Per Cur. Porter, J.* It is an admitted principle, that slavery has been permitted and tolerated in all the colonies established in America by the mother country. Not only of Africans, but also

* The Spaniards and Portuguese were engaged in the traffic of African negroes and slaves before the discovery of America. Bancroft's History of the United States, vol. 1. p. 178.; and the importation of slaves into the Spanish colonies began as early as 1501. Irving's life of Columbus, vol. 3. App. No. 6. In the year 1562, Sir John Hawkins was engaged in transporting and selling slaves in the West Indies; and in the years 1585 and 1588, charters were granted by Queen Elizabeth, encouraging the trade. In 1620, a Dutch vessel carried slaves from Africa to Virginia, being the first importation in the English colonies. And in 1672, the African company was established in Great Britain. It appears by the records of the Dutch New Netherlands, that slaves existed in their settlements as early as 1620. Moulton's History of New-York, vol. 1. p. 373.: 2 Kent's Com. vol. 2. p. 252.; and in Massachusetts, between 1630 and 1641.; Ibid.; and Massachusetts Collection, vol. 4. p. 194. Bancroft's History, vol. 1. p. 187. In the year 1663, slaves were found in Maryland, and it is supposed they were introduced there as early as 1580. The Royal African Company, chartered by Queen Elizabeth, in 1585, continued to supply the colonies until 1709, when the trade was thrown open. A more extended historical view of the subject may be considered out of place in a mere practical work. Those desirous of investigating the subject further, will find it treated in the Encyclopædiæ Americana, tit. Slaves. Kent's Com. vol. 2. p. 252. American Jurist, vol. 7. p. 1. Jefferson's Notes on Virginia, p. 252. Burk's History of Virginia, 2211. Beverley's History of Virginia, 251.

With respect to its dissolution. It was first commenced by a number of Quakers, in 1727, who liberated their slaves, both in England and the colonies of North America. In 1751, the Quakers made a formal abolition of it among themselves. In 1783, the first petition was presented to parliament for the abolition of the trade. See a statement of the proceedings in the Edinburgh Encyclopædia. The subject came again before the house of commons, in 1788, being brought forward by Mr. Pitt, but without success.

In 1792, the house of commons passed a bill for the abolition of the slave trade in

of Indians. No legislative act of the colonies can be found in relation to it. The first introduction of slaves in the British colonies was accidental. In the year 1616, as stated by Robertson in his history, and in 1620, as stated by Judge Marshall in his Life of Washington, a Dutch ship, from the coast of Guinea, sold a part of her cargo of negroes to the planters on James River. This was the origin of the slavery of the blacks in the British colonies, and it is thought that Indians, at this time, were held in slavery.

2.

DAVIS (a man of color) v. CURRY. Fall T. 1810. 2 Bibb's Rep. 238.

In an action for freedom, Davis proved that, in the year 1789, he was brought as a slave into the then district, now state of Kentucky, from the state of Delaware, where he had been held as a slave. There being no proof of any law of that state which authorized slavery, he moved the court to instruct the jury, that the evidence, on the part of the defendant, was not sufficient to support his title.

Slaves were introduced in the colonies by the mother country.

The court refused the instructions, and he excepted.

Per Cur. Boyle, Ch. J. Slavery, it is believed, was introduced into the colonies by the regulation of the mother country, of which

1795, but it was rejected by the house of lords. And in 1796, Wilberforce brought in a bill, providing that the slave trade should be abolished forever, after the 1st March, 1797. See the debates in parliament of that year. In June, 1806, on motion of Mr. Fox, a bill passed, declaring the slave trade inconsistent with justice, humanity, and sound policy; and the act finally abolishing it, passed Feb. 5, 1807. The act, making it felony to be engaged in the slave trade, passed the British parliament, May 4, 1811, which was followed by the act, declaring the slave trade piracy, in 1824.

The first act to prohibit the slave trade was passed in the year 1794. The act declared it illegal to fit out any vessel for the purpose of carrying on the trade. This was followed by the act of 1800, declaring it unlawful for any citizen to have any property in any vessel employed in the transportation of slaves from one country to another. And by an act, passed in 1807, it was declared, that after the 1st of January, 1808, it should not be lawful to bring into the United States, or the territories thereof, from any foreign place, any negro, mulatto, or person of color, with intent to hold or sell him as a slave. In 1820, it was declared, that, if any citizen of the United States, belonging to the company of any foreign vessel, engaged in the slave trade, or any person whatever belonging to the company of any vessel, owned, in whole or in part, by, or navigated for, any citizen of the United States, should land on any foreign shore, to seize any negro or mulatto, not held to service by the laws of either of the states or territories of the United States, with intent to make him a slave, or should decoy, or forcibly carry off such negro, or mulatto, or receive him on board any such vessel, with the intent aforesaid, he should be adjudged a pirate, and on conviction, suffer death.

the courts in all the colonies were equally bound to take notice, in the same manner as the courts of the several states are now bound to take notice of any regulation of the general government; and what the courts of the colonies were bound to take notice, judicially, we must still be presumed to know, if not as matter of law, at least as matter of history. We must, therefore, presume that slavery is tolerated in Delaware, inasmuch as that was the case before the revolution. The presumption of slavery, which attaches to the plaintiff, is not destroyed by proof of his removal from that state.

3

HALL V. MULLIN. June T. 1821. 5 Har. & Johns. Rep. 190.

The condition of slaves does not depend exclusively upon the civil or feudal law.

Benjamin Hall, by his will manumitted his slave Basil. It appeared, however, that Basil was upwards of 45 years of age, and therefore incapable of being emancipated. Afterwards, Henry L. Hall, the son of the testator, sold to Basil his slave Dolly Mullin, and who was the daughter of Basil, who then emancipated her; and Henry L. Hall bequeathed property to her, both real and personal. The defendant entered upon this property, and this action of trespass was brought.

It was contended, that Basil, not being manumitted, could not bestow freedom on Dolly Mullin, and that she was not capable of taking by the devise.

Per Cur. Johnson, J., It has been contended, on the part of the appellant, that the condition of slaves in this state is regulated by the civil law; and that as by that law slaves could purchase property only for the sole use and benefit of their masters, that, therefore, the bill of sale of Dolly to Basil, the right to Dolly passed out of Hall, and became immediately vested in the then owners of Basil, who were the general representatives of Benjamin Hall. On the part of the appellee it is urged, that the slaves in this state are similar to villeins in England, when villeinage existed in that country; and that, as in that country, when a villein purchased property, it did not pass immediately by or through him to his lord, but remained in the villein until the lord entered on, or took possession of the property; any disposition made of such property, before the entry was made, or possession taken, was valid. Cooper's Jurinian, 107. Litt. §. 177.*

* Before the conquest there were villeins in Great Britain. 1 Hume's Hist. of England, p 181. A villein might be by prescription or confession in a court of record. Co. Litt. 117. B. The last confession of villeinage is in 19 Hen. 6. (1441.) Loft.

As it appears by the civil law, the property never abides for one instant in the slave, if the rights of Dolly Mullin, as derived from her father Basil, depend upon that law; as Basil was incapable to manumit, no claim on her part can rest on a deed of his execution. But should her rights rest on the feudal law, applicable to villeinage, then, as Basil never was disturbed in the possession of Dolly by any of the representatives of Benjamin Hall, or any other person, before or after the deed of manumission was executed, that deed would be competent to set her free, and, of course, renders her capable to take the land devised. But the condition and rights of slaves in this state depend exclusively, neither on the civil or feudal law, but may, perhaps, rest in part on both, subject, nevertheless, to such changes in their condition and capacity to contract as the laws of this state prescribe, and as contained in various acts of our state legislature. By the act of 1715. ch. 44. § 11., it was prohibited "to trade, barter, commerce, or any way deal with any slave," without the leave of the master. The contract between Henry L. Hall and Basil under this act was void.

WHO MAY BE HELD IN SLAVERY.

(A.) OF THE AFRICAN.

1.

NEGRO MARY v. THE VESTRY OF WILLIAM AND MARY'S PARISH.

Oct. T. 1796. 3 Har. & M'Hen. 501.

Petition for freedom. It was admitted the petitioner was descended from negro Mary, imported many years ago into this

Negroes imported from Madagascar may be held as slaves.

17; and there were no villeins in gross in Great Britain in 1547, and the last case on villeinage is to be found in Dyer, 266. pl. 11. It was virtually abolished by the statute 12 Car. 2. ch. 24. These were some of the principles of villeinage: Villeinage descended to the issue when the father and mother were villeins. Co. Litt. § 181. But if a freeman married a neif, their issue was free. Co. Litt. 123. If a neif had a bastard, he was free. The issue followed the condition of the father. The children of a free woman becoming villeins, and of a neif becoming free, where a freeman married a neif. Co. Litt. § 185. Villeins were either regardent, that is, annexed to the land, or else they were in gross, and annexed to the person of the lord, and transferrable by deed from one to another, the same as any chattel, and they might be recovered as any other chattel.

country from Madagascar; and the question was, whether she was entitled to her freedom.

It was contended that Madagascar was not a place from which slaves were brought, and that the act of 1715 related only to slaves brought in the usual course of the trade. On the other side, it was contended, that the petty provinces of Madagascar make war upon each other for slaves and plunder; and they carry on the slave trade with Europeans.

Per. Cur. Madagascar being a country where the slave trade is practiced, and this being a country where it is tolerated, it is incumbent on the petitioner to show her ancestor was free in her own country to entitle her to freedom,

2

HUDGINS v. WRIGHT. Nov. T. 1806. 1 Hen. & Munf. Rep. 139.

Per Cur. The slavery of the African negro has existed from the time of bringing them into the colony. In many of the states express enactments have been made declaring them slaves; and in others they are slaves by *custom*. See the act of assembly of Maryland of 1663, commented upon, and explained in *Butler v. Craig*, 2 Har. & M'Henry's Rep. 214., and *Butler v. Boardman*, 1 Har. & M'Hen. 371.; 2 Brevard's Dig. 229.; Prince's Dig. 446; Rev. Code of Mississippi, p. 369.; 1 Rev. Code of Virginia, 421.; Code of Louisiana, art. 138.; 2. Litt. & Swi. 1149.

The Africans, or negroes, have been slaves from the time they were brought into the colonies, either by statute or by custom.

(B) OF INDIANS.

1.

SEVILLE v. CHRETIEN. Sept. T. 1817. 5 Martin's Louisiana Rep. 275. STATE v. VAN WAGGONER. 1 Hals. Rep. 374.

Mathews, J., delivered the opinion of the court. The plaintiff, and appellant, sues, *in forma pauperis*, to recover his liberty and judgment having been given against him, he appealed. The evidence, which is all written in the form of depositions and other documents, comes up with the record, and a statement of the case is made by the counsel.

Under the French government in Louisiana, some Indians were held in slavery, and the freedom of such was not acquired by the establishment of the Spanish government.

The district judge having admitted all the testimony offered, we deem it useless to enter into a formal investigation and decision of each exception, but will proceed to state the facts, as drawn from the evidence which was properly received. A summary of such

Of them as are necessary to arrive at proper legal conclusions, may be laid down as follows : In the year 1765 or 1766, Duchene, an Indian trader, brought an Indian woman to Opelousas, whom he sold to Chretien, the father of the defendant, and appellee. She died not long after, leaving a female child, who remained peaceably with Chretien, as his slave, until some time during the period in which the Baron de Carondelet was governor of the province of Louisiana, when she went to New-Orleans with her master, for the purpose of claiming her freedom before the proper tribunal. It appears from a certificate of Peter Pedesclaux, a notary, that a suit was commenced, but no record remains, or can be found, of the manner in which it terminated. She returned with Chretien, and remained with him as his slave until his death, which happened after the United States took possession of the country under the treaty made with the French government in the year 1803. She was called Agnes, and brought forth several children while held in a state of slavery by Chretien, of whom the plaintiff, and appellant, is heir. After the death of the ancestor of the defendant, and the distribution of his estate, Agnes and some of her children, all descended from the Indian woman sold by Duchene, as above stated, brought suit in the parish court of St. Landry against their owners, among whom was the present defendant, to recover their freedom. From a judgment by default, which afterwards became final, an appeal was taken to the superior court of the late territory of Orleans, where the cause was tried by a jury, and a verdict rendered in favor of the then plaintiff, and appellee, which was set aside by the court, on account of some misconduct in the jury, and a new trial ordered. The case remained in this situation until the change in the country, from a territorial to a state government, and was then transferred with others to the fifth district under the new system. As the person who became judge of that district had been engaged as counsel in the cause, it was transferred for trial to the second district, and the then appellee, who was the original plaintiff, not appearing to prosecute his suit, was declared by the court to be non-suited, and judgment was accordingly entered. It appears from the depositions of a number of witnesses, (admitted by the parties to have been correctly taken, and to be proper evidence in the cause,) that at the time the Spanish government took possession of the country, viz. in 1769, under the secret treaty of cession made between France and Spain in 1763, many of the inhabitants of the colony, which had been established and set-

tled under the authority of the French government, held and possessed Indians as slaves, and it seems to have been a belief pretty general among them that the practice of holding Indians in slavery was tolerated and authorized by that government. The fact that a considerable number of Indians and their descendants were held in slavery at the period alluded to, is clearly proven. These being all the important facts in the case, we will proceed to examine the plaintiff's, and appellant's, claim to freedom, on the ground taken by his counsel. It is grounded on a judgment of the parish court of St. Landry, as being *res judicata*, by a competent tribunal. But if it be determined that it be not conclusively supported and established by the judgment, it is contended that the plaintiff, and appellant, is free by birth, being the lineal descendant of an Indian woman. His counsel contends, that the decision of the cause must be according to the rules of the Spanish system of laws. According to these laws it is clear, that since the famous regulations of Charles V., made about the middle of the fifteenth century, Indians could not be reduced to slavery; and if the case was to be decided by them, he would certainly be entitled to his freedom. But on the other side, it is contended, that this court ought to be governed in the determination of this suit by the municipal laws and usages of France, by which her American colonies were ruled. On this previous question our opinion is in favor of the defendant, and appellee. It is true that the province of Louisiana was ceded by France to Spain, in 1763, by a secret treaty, but no effectual possession of the country was taken until the arrival of governor O'Reilly in 1769. Now, it is an incontrovertible principle of the law of nations, that in cases of the cession of any part of the dominions of one sovereign power to another, the inhabitants of the part ceded retain their ancient municipal regulations, until they are abrogated by some act of their new sovereign. In relation to the colony of Louisiana, nothing tending to repeal its former laws, such as they were under the French government, took place till the year 1769, and we have already seen that the Indian woman, the ancestor of the plaintiff, was brought into the country and sold as a slave in the year 1765 or 1766.

Slavery, notwithstanding all that may have been said and written against it, as being unjust, arbitrary, and contrary to the laws of human nature, we find in history, to have existed from the earliest ages of the world down to the present day. In investigating the rights of the parties now before the court, it is deemed unneces-

sary to inquire into the different means by which one part of the human race have, in all ages, become the bondsmen of the other, such as captivity being the offspring of those already enslaved, &c. However, we are of opinion, that it may be laid down as a legal axiom, that in all governments in which the municipal regulations are not absolutely opposed to slavery, persons already reduced to that state may be held in it; and we also assume it, as a first principle, that slavery has been permitted and tolerated in all the colonies established in America by European powers, most clearly as relates to the blacks and Africans, and also in relation to Indians in the first periods of conquest and colonization. Taking this principle for granted, it accounts, in some measure, for the absence of any legislative act of European powers for the introduction of slavery into their American dominions. If the record of any such act exists we have not been able to find any trace of it. It is true that Charles the Fifth, in the first part of the sixteenth century, granted a patent to one of his Flemish favorites, for the exclusive right of importing four thousand negroes into America, which was purchased by some Genoese merchants, who were the first who brought into a regular form the commerce for slaves between Africa and America. A few years before a small number of negroes had been introduced by the permission of Ferdinand. But the privilege granted by the emperor, so far from being the first introduction of slavery into the new world, was intended as a means of enabling the planters to dispense with the slavery of the Indians, who had been reduced to a state of bondage by their European conquerors. A full account of these transactions may be seen in Robertson's History of America. On turning our attention to the first settlement of the British colonies in America, we find that the introduction of negro slaves into one of the most important, was accidental. In the year 1616, as stated by Robertson, and 1620, by Judge Marshall, in his life of Washington, a Dutch ship from the coast of Guinea sold a part of her cargo of negroes to the planters on James river. This is the first origin of the slavery of the blacks in the British American provinces. About twenty years after, slaves were introduced into New England. All this took place without any previous legislative act on the subject; and it is believed that Indians were at the same time, and before, held in bondage. The absence of any act, or instrument of government, under which their slavery originated, is not a matter of greater surprise than that there should be none found au-

thorizing the slavery of the blacks. The first act of the legislature of the province of Virginia on the subject of the slavery of the Indians, was passed in 1670, and one of its provisions, as we are informed by Judge Tucker, prohibits free or manumitted Indians from purchasing christian servants. The words *free or manumitted* are useless and absurd, if there did not exist Indians in slavery, and Indians who had been slaves, and had been manumitted before and at the time this act was passed. Indeed, from the history and legislative proceedings of the British colonies, both in the West India islands and in North America, it clearly appears, that in most, if not in all of them, the slavery of the Indians was tolerated by government in the early period of their settlement, without any specific legislation on that subject. The French government was later in establishing colonies in America than the British and Spanish. In our researches on the subject under consideration, we have not been able to discover any legislative act of it, by which the colonies were authorized to hold Indians in bondage, but that it was customary to purchase and hold some classes of them in slavery, cannot be doubted. This cannot have been without the permission, or at least the toleration of government. Moreau de St. Mery, speaking of the black population of St. Domingo, observes, that among it are the descendants of some Indians from *Guiana*, Louisiana, &c., whom government and individuals, in violation of the law of nature, deemed it profitable to reduce to slavery. 1 Hist. St. Dom. 67. In the beginning of the eighteenth century, he adds, there were upwards of three hundred Indian slaves, in the French part of St. Domingo. In 1730, the governor of Louisiana sent three hundred of the Natchez tribe to be sold. Several arrived after that period from Canada and Louisiana. Here we have historical facts establishing, beyond contradiction, the holding of Indians as slaves, in one of the French colonies, many of whom were transported from the very colony in which the ancestor of the plaintiff, and appellant, were held in bondage. Were it necessary to prove that they were legally held so, the evidence of it would be found in their being taxed as slaves, (2 St. Domingo Laws, 541.,) a circumstance which creates, at least, a very violent presumption that the municipal regulations of the French colonies did not prohibit the slavery of the Indians.

This appears to have been the opinion of the Spanish government, which we have seen succeeded to the French in Louisiana. Governor O'Reilly, in 1769, on taking possession of the colony,

discovered that a considerable number of Indians were held in slavery by the French colonists. This he declared, by a proclamation, to be contrary to the wise and pious laws of Spain : but by the same instrument, he confirmed the inhabitants in the possession of such Indian slaves, until the pleasure of the king, in this respect, could be known. Here is then a recognition of the right of the possessors, to hold their Indians slaves, until the legislative will of the monarch should deprive them of it. This never did happen. In conformity with this opinion, is a decree of the Baron de Carondelet, twenty-five years after, in 1794, by which he orders two Indians, Alexis and David, to return to, and abide with their owners, until the royal will was expressed to the contrary. The inhabitants of the colony of Louisiana, while under the government and dominion of France, held Indians in slavery. The Spanish government, under which they passed, recognized their right to hold them, until it should be altered by a declaration of the king's will. It never was declared. The colony, without any change in the condition of the original population, is receded to the French nation, and by it transferred to the United States, under a treaty securing to its inhabitants their rights to property, as they stood under the former government. Throughout these political changes, the ancestor of the defendant, and appellee, remained undisturbed in his possession of the plaintiff, and appellant's mother, as his slave, and of him since his birth. It is true that, during the government of the Baron de Carondelet, the plaintiff's mother, as has been stated, made an attempt to obtain her freedom. What proceedings took place before that governor, whether any, or what judgment was rendered, cannot now be ascertained. The only thing clear is, that she returned with the defendant's father from New-Orleans, and remained with him as his slave until his death. This certainly raises a presumption, that the suit terminated in a manner unfavorable to her claim. If this is to have any weight on the determination of the present case, it must certainly be placed against the plaintiff. Upon the whole, we are of opinion, that neither from a view of political changes in the country, nor a fair examination of the subject, is the plaintiff, and appellant, entitled to his freedom.

2.

ULZIRE ET AL. V. POEY FARRE. May T. 1824. 14 Martin's Rep. 504.

The issue of an Indian woman is free.

Per Cur. Porter, J. This is an action in which the plaintiffs, who aver that they are descended from Indians, now claim their freedom. The issue joined is *liberi vel non*. The cause was submitted to a jury, on special facts, who have found that the petitioners are descended from an Indian woman of the Chickasaw tribe; and that the defendant has shown no title to hold them as slaves. On this verdict, the duty of the court is very simple: if the defendant hold the plaintiffs in slavery without any title, he does so illegally, and they must be set free. Judgment affirmed.

3.

BUTT V. RACHEL ET AL. Feb. T. 1814. 4 Munf. Rep. 209. S. P. HUDGINS V. WRIGHTS, 1 Hen. & Munf. 134.; PALLAS ET AL. V. HILL ET AL., 2 Hen. & Munf. 149.; 1 Tuck. Blk., part 2. p. 47.

A native American Indian brought into Virginia since 1691 could not lawfully be held in slavery, altho' the Indian was a slave in the country from which she came.

Suit for freedom. The plaintiffs claimed their freedom as being descendants of Paupouse, a native American female Indian, who was brought into Virginia about the year 1747; and moved the court to instruct the jury, that no native American Indian brought into Virginia since the year 1691, could, under any circumstances, be made a slave; which instruction the court gave. The defendant claimed to hold the slaves upon the ground, that though they were the descendants of Paupouse, a native American Indian, yet Paupouse was a slave, and held as such in the Island of Jamaica, by the wife of a Mr. Ivey, and brought by the said Ivey into Virginia, as a slave, about the year 1747. And the defendant moved the court to instruct the jury that a native American Indian, held in Jamaica as a slave, under the laws of that island, and imported into Virginia by her proprietor in the year 1746, or 1747, might lawfully be held as a slave in Virginia, notwithstanding such person was a native American Indian. But the court refused to give the instructions. Verdict and judgment for plaintiffs, from which the defendants appealed. And on a subsequent day the court affirmed the judgment.

4.

HUDGINS v. WRIGHTS, Nov. T. 1806. 1 Hen. & Munf. 134.

PALLAS ET AL. v. HILL ET AL., 2 Hen. & Munf. 149.

The court held, that Indians had always been considered as free persons, in fact and in right. In the year 1679, the Virginia legislature passed an act, declaring Indian prisoners taken in war to be slaves; and in the year 1682, another act was passed, declaring that Indians sold to us by neighboring Indians, and others trading with us, should be slaves. But in the year 1691 these acts were repealed, and no Indian could be made a slave under the laws of Virginia since the latter period. And the General Court, in April T. 1777, decided that all American Indians brought into this country since the year 1705, and their descendants in the maternal line, are free. See JENKINS v. TOM. 1 Wash. Rep. 123. COLEMAN v. DICK. & PAT., 1 Wash. Rep. 239.

No native Indian could have been made a slave in Virginia since 1691.

5.

HUDGINS v. WRIGHTS, Nov. T. 1806. 1 Hen. & Munf. 134.

HOOK v. NANNY PAGEE, 2 Munf. 379.

Held by the court, that the presumption was, that all Indians introduced into the state, at any time, were *prima facie* presumed to be free, or that, if the date of their introduction did not appear, the *prima facie* presumption was, that they were American Indians, and brought in after the act of 1705, and therefore free.

The presumption in their favor.

6.

HUDGINS v. WRIGHTS, Nov. T. 1806. 1 Hen. & Munf. 134.

Held by the court, that if a female ancestor of a person asserting a right to freedom, whose genealogy is traced back to such ancestor through females only, be proved to have been an Indian, it seems incumbent on those who claim such person as a slave, to show that such ancestor, or some female from whom she descended, was brought into Virginia between the years 1679 and 1691, and under circumstances which, according to the laws then in force, created a right to hold her in slavery.

Which may be rebutted.

7.

GREGORY v. BOUGH, March T. 1831. 2 Leigh's Rep. 686.

And which presumption may again be supported by facts and circumstances. *Per Green, J.* I cannot for a moment doubt the propriety of the former decisions of this court, and of the instruction under consideration, that proof that a party is descended in the female line from an Indian woman, and especially a *native American*, without any thing more, is *prima facie* proof of his right to freedom—liable to be repelled by proof that his race has been immemorially held in slavery; which may be in turn rebutted by the consideration of the ignorance and the helpless condition of persons in that situation, aided by other circumstances, such as that many such were bound by law to a service equivalent, in all respects, to a state of temporary slavery, until they attained the age of thirty-one years; and in many cases, (according to circumstances existing almost in every case,) for an uncertain term beyond that age.

8.

STATE v. VAN WAGGONER. April T. 1797. 1 Halst. Rep. 374.

Indians were held in slavery in New-Jersey. On a *habeas corpus* for the body of Rose, an Indian woman, claimed by the defendant as a slave, it appeared that the mother of Rose had been purchased as a slave, and had been held as such for 55 years. It was contended, that as the mother and daughter were confessedly Indians, it furnished *prima facie* evidence, at least, that they were free. On the other hand, it was contended, that the acts of the legislature of New Jersey, recognised Indians as slaves. March 11, 1713—14. Allison, p. 18. And the act of May 10, 1768; and also the act of 1769. And the same principles prevailed in Pennsylvania. 1 Dall. Rep. 167.

Per Cur. Kinsey, Ch. J. The *habeas corpus* in this case seems to have been sued out under the supposition that an Indian could not be a slave under our laws. But this idea is contradicted by various acts of assembly, some of which have been cited on the argument; and, indeed, it cannot be urged with any show of reason. They have been so long recognised as slaves in our law, that it would be as great a violation of the rights of property to establish a contrary doctrine at the present day, as it would in the case of Africans; and as useless to investigate the manner in which they originally lost their freedom.

(C.) OF WHITE PERSONS.

1.

BUTLER v. BOARMAN, Sept. T. 1770. 1 Har. & M'Hen. 371.

The petitioners, William and Mary Butler, claimed their freedom, as being descended from a free white woman, called Eleanor, or Irish Nell, who was brought into Maryland by Lord Baltimore, as a domestic servant, before the year 1681. They were claimed as slaves by reason of the marriage of their ancestor, Irish Nell, with a negro slave, under the act of 1663, ch. 30. It was in proof, that she was married to the negro slave in the year 1681, and in the same year, but afterwards, the act was repealed. The court adjudged the petitioners free; and the defendant appealed to this court, where, after argument, the judgment was reversed; the court holding, that the issue born after the repealing law were slaves, the marriage taking place before the repeal; or, in other words, where a white woman intermarried with a slave, the issue are slaves, though the act subjecting such issue to slavery, was repealed, if the marriage took place before the repeal of the act.

A white woman marrying with a slave the issue is deemed slave, although the act subjecting them to slavery be repealed immediately after the marriage.

2.

BUTLER v. CRAIG. Oct. T. 1787. 2 Har. & M'Hen., Rep. 214.

And see BUTLER v. BOARMAN, 1 Har. & M'Hen. Rep. 374.

Petition for freedom by Mary Butler, claiming her freedom as a descendant of Irish Nell, a free white woman. After proof of the descent of the petitioner from Irish Nell, the defendant offered to read the evidence taken in the former cause of Butler v. Boarman, to prove that Irish Nell was married to a negro slave, during the existence of the act of 1663; and to prove that she was a slave, and all the issue and descendants from the said marriage have been constantly held and considered as slaves, and that the petitioner, one of the descendants, had always been held and considered as a slave by the defendant. To which evidence the petitioner's counsel objected, alleging, that a record of the conviction of the said Irish Nell, for having intermarried with the slave, should be produced, and that without such conviction, neither the said Irish Nell, nor any of her descendants could legally be slaves.

Before the issue of a free white woman can be held in slavery under the act of 1663, for marrying a negro, making such woman and her issue slaves, a conviction of the mother must be proved.

The court was of opinion, that without a conviction in a court of record of Irish Nell's having intermarried with a slave, she could not become a slave, nor could her issue become slaves by virtue

of such marriage ; and that no presumption of conviction could arise from the petitioner and her ancestors having been held in slavery.

The defendant appealed, and the court confirmed the judgment.

3.

HOOK V. NANNY PAGEE, AND HER CHILDREN. JUNE, T. 1811.
2 Munf. Rep. 379.

If from inspection it appears to the jury the plaintiff is a white person, they ought to find that he is a free man, unless it be proved that he descended in the maternal line from a slave. Suit for freedom. The Jury found, among other things, that Nanny Pagee was a white woman, in the following words : " We of the jury also find, from inspection, that the said Nanny Pagee is a white woman ; We of the jury *therefore* find that the plaintiffs are free persons, and not slaves."

It was contended that the word *therefore*, compels the court to inquire whether the premises were correct from which the jury drew their conclusion. On the other hand, it was said, that the verdict closed all other questions, by finding that the plaintiffs were white persons. HUDGINS V. WRIGHTS, 1 Hen. & Munf. 134.

Per Cur. Brooke, J. It is said, that the distinguishing characteristics of the different species of the human race are so visibly marked, that those species may be readily discriminated from each other by inspection, and that in the case of a person visibly appearing to be of a slave race, it is incumbent on him to make out his freedom ; but in the case of a person visibly appearing to be of a free race, it is required of his adversary to show he is a slave. Applying the doctrine to the case, I have no doubt the judgment of the district court was correct upon the verdict of the jury ; putting out of the case every thing in the verdict, except the finding of the jury, that from inspection, the said plaintiff, Nanny Pagee, is a white woman ; and this is quite sufficient, it being incumbent on the defendant to have proved, if he could, that the plaintiff was descended in the maternal line from a slave. Having not proved it, she and her children must be considered as free.

(IV.) OF THE INCREASE OF SLAVES.

(A.) TO WHOM THE INCREASE BELONGS.

1.

ERWIN & OTHERS v. KILPATRICK AND OTHERS. June T. 1825.

3 Hawk's North Carolina Rep. 456.; GLASGOW v. FLOWERS, 1 Haywood's Rep. 233.; TIMMS v. POTTER, Martin's N. C. Rep. 22.; JONES v. JONES, C. & N. 310.; PRESTON v. M'GAUGHEY, C. C. U. S., Cook's Rep. 113.

This was a petition filed in the court below, against the defendants, as executors of the last will of *William Erwin*, deceased. The Petition stated, that the petitioners were the daughters of the testator, who having made a last will and testament, died, and the defendants proved the will, and assumed the execution thereof. That among other bequests, the will contained the following: "If my wife cease to be my widow by marriage, it is my will that she shall have her bed, and her choice of one horse, and a fifth part of the household and kitchen furniture, but have no further claim to the use of my negroes. In this case, or at her death, it is my will that my son Joseph shall have my negro named Isaac, and my son John shall have Jack, and Lyd his wife, requiring of him some care of, and attention to, such of his sisters as may remain unmarried." The petition further stated, that after the death of the testator, and during the life of his widow, the slave Lyd had issue two children, Alfred and Verdy, after which the widow died; that the testator's son Joseph is dead without issue, and that John Erwin claims the negroes. The petition then insists, that the negroes Alfred and Verdy were undisposed of by the will, and prays that the defendants may be compelled to make distribution among the petitioners and John Erwin, the surviving children of the testator.

John Erwin, the son, being also made a defendant, answered, claiming the negroes Alfred and Verdy, (the children of Lyd, born during the life estate of his mother,) because he was by the will entitled to the mother, Lyd, after the death of the widow.

The petition was dismissed, and the petitioners appealed.

Per Cur. Taylor, Ch. J. Ever since the case of *Timms v. Potter*, the question arising in this case has been considered at

rest ; and it would be attended with the most mischievous consequences again to draw it into controversy. It has now become a fixed rule of property, that the increase of slaves born during the life of the legatee for life, belong to the ulterior legatee, who is the absolute owner. The judgment must be affirmed.

2.

PRESTON v. M'GAUGHEY. June T. 1812. 1 Cook's Rep. 115.
CRAIG v. ESTES, 1 Cook's Rep. 381.

A contrary rule as to increase applies to live stock.

The court held, that it had been too long settled to be recalled, that if there be an estate for life in a negro woman, and pending the estate she has children, they will go to the remainder-man.

Per Overton, J. From the cases it will appear, that if a negro woman is devised to one for life, with remainder to another, and during the life estate the woman have children, they belong not to him who has the life estate, but to the remainder-man. The increase must go to the person who has the general property, and not to the owner of the particular interest. But the rule does not apply "to live stock." *Murphy v. Rigg*, 1 Marsh. 532. ; *Miller v. M'Clelland*, 7 Munroe's Rep. 232.

3.

TIMM'S v. POTTER, 1 Haywood's Rep. 234. ; CRAIG v. EUSTIS, 1 Cook's Rep. 381. ; PRESTON v. M'GAUGHEY, Cook's Rep. 113.

The issue follows the condition of the mother.

Held by the court, that the issue of a female slave follows the condition of the mother, and belongs to the remainder-man, and not to the tenant for life.

4.

NED ET. AL. v. BEAL. SPRING T. 1811. 2 Bibb, 298.

Same rule in Kentucky.

The testator devised that his negro slave Jude should be free in 1804. After the death of the testator, and before the year 1804, the plaintiffs were born of Jude, who brought this suit for their freedom against Beal, who claimed them as slaves. The circuit court gave judgment for defendant.

Per Cur. Boyle, Ch. J. The general rule is, that the children follow the condition of the mother, at the time of their birth, according to the maxim *partus sequitur ventrem*. Hence, it naturally follows, if Jude, the mother of the appellants, were at the time of their birth a slave, that they are also slaves. Judgment affirmed.

5.

SCOTT v. DOBSON, October T. 1749. 1 Har. & M'Henry, 160.; SOMMERVILLE v. JOHNSON, 1 Har. & M'Henry, 348.; HAMILTON v. CRAIG, 6 Har. & Johns. Rep. 18.

Replevin for Lewis and Sampson, two negro boys, and Kate and Phoebe. The jury found, that Benjamin Parrot, by his late will and testament, devised as follows: "I leave unto my wife four negroes during her natural life; that is to say, Kate, Alice, Moreah, and Rose, and after her death to be divided between my seven children, Benjamin, Mary, Hannah, Eliza, Jane, Rebecca and William Parrot." The defendant, Hannah, is one of the children mentioned in the will, and took and detained the negroes after the death of the testator's wife, and the plaintiff intermarried with the widow; that the negroes mentioned in the declaration were born after the death of the testator, of the bodies of the slaves mentioned in the will, and while they were in the possession of the widow of the testator and her husband. The provincial court gave judgment for the defendant, and the plaintiff appealed to this court where the judgment was reversed. And, see *Sommerville v. Johnson*, Feb. T. 1770, 1 Har. & M'Henry, 348., and Mr. Dulany's opinion appended to the case. In speaking of the above case, Mr. Dulany says, that the bar of Maryland have considered the case as settling the law, that purchases have been made, and much property is held under the decision. And that the two principal reasons which governed the court were, 1st. That the issue ought to go to the person to whom the use was limited; otherwise, having no interest worth regarding, he might not take care of the issue, and that it would only be a reasonable satisfaction for the expenses of maintenance. 2d. That when the use is given, a bounty at all events is intended; but instead of a benefit, if the issue should go over, there might be a loss.* And in *Bohen v. Headly*, 7 Har. & Johns. Rep. 257., *Archer, J.*, held, that the issue of slaves born during the existence of a tenancy for life belong to the tenant.

Contra.
A legatee for life of slaves is entitled to the issue born during the life estate.

* And see Mr. Dulany's opinion, 1 Har. & M'Henry, 557., where he held, that where A. was possessed of a negro woman slave, who in the life time of A. had issue, which issue also had issue after the death of A., can the representatives of A. claim a share in the issue of the children born after the death of A.? I think the representatives of A. might claim the issue.

6.

HAMILTON v. CRAGG. June T. 1823. 6 Har. & Johns. Rep. 16 ;
 S. P. SCOTT v. DOBSON, 1 Har. & M'Hen. 160. ; SOMMER-
 VILLE v. JOHNSON, *ibid.* p. 352. ; STANDIFORD v. AMOS,
 1 Har. & Johns. Rep. 526.

Where a negro woman bequeathed to one for the life of the legatee, has issue during his life, after the death of the testator such issue shall belong to the legatee, on the ground that the issue is to be considered not as an accessory, but as part of the use, and to go to the person to whom the use is limited.

The court, *Buchanan, J.*, held, that were a negro woman devised to one during the life of the devisee, and then to be free, the children born during the life of the devisee would be slaves. They follow the condition of the mother at the time of the birth, who, though to become free herself, on the death of the legatee, was, during her life time, not in the capacity of a servant, but in the state and condition of a slave;* she had no civil rights, and could have pursued no legal remedy against her mistress on any account; she could have made no will, and was incapable of taking by descent or by purchase, the product of her labor belonged to her mistress; she could neither plead or be impleaded, and was subject to all the disabilities and incapacities incident to a state of slavery. She was a mere chattel, the property of her mistress, who could have sold or transferred her at pleasure. In this state of slavery the petitioner was born, and though on the death of the legatee, the mother became free, yet she may be said then first to have been "born into civil life," and her new-born capacities, incident to her new state of being, could not have a retrospect to the time of the birth of her children, to the effect of giving them civil rights.

7.

CONKLIN v. HAVENS, August T. 1815. 12 Johns. Rep. 314.

The same principle has been adopted in New-York.

Trespass and false imprisonment. One Conklin was owner of a negro slave, named Maria, and her daughter Cloe, and by his will bequeathed as follows: "Item, I give my negro wench, Maria, her time; and I give to Maria her daughter Cloe, during her natural life." The plaintiff was a child of Cloe, and the question was, whether she was a slave.

Per Cur. Yates, J. Our opinion is, that by the words of the will the testator gave Cloe to her mother during the life of the

* In the circuitcourt of the United States, Judge Cranch held, in the cases of Negroes Peter and Lewis v. D. T. Cureton and Preness, November T. 1824, that the children of a female slave sold for a term of years, born during the servitude, are the slaves of the person entitled to the service of the mother at the time of the birth. And the same principle was decided in the case of Negro Sarah v. Elijah Taylor, November T. 1818, and Negro Fanny v. Isaac Kell, May T. 1824.

mother. According to the principles of law, a person hiring an animal is entitled to the increase, because, for hiring for a time he becomes temporary proprietor for the time of the animal. And the doctrine becomes stronger where the hiring is for life.

The children of Cloe were born during the life time of Maria, and while she was entitled to her services. They, therefore, belonged to her; and in case of her decease, to her legal representatives; and if there be no such representatives, which is probably the case in this instance, the children being the issue of her own daughter, they, of course, have become free. The plaintiff being one of those children, if not entitled to his freedom altogether, at all events, cannot be claimed by the defendant in this case.

(B.) OF THE GRANT OR DEVISE OF THE INCREASE.

1.

PULLER'S EXR'S V. PULLER. December T. 1824. 3 Rand. Rep. 83.

This was a bill by Mrs. Puller against the executors of her husband, enjoining them not to sell two slaves, Garret and Icy, which they had advertised.

The testator, Puller, on the 4th of March, 1818, made his will, and devised as follows: "I give to my beloved wife, Ann Puller, 500 acres of land, including my present dwelling, and a negro woman named Jenny, and her increase," &c. Jenny had two children, Garret and Icy; the youngest of whom was 14 years of age at the date of the will. Jenny was near 40 years of age at the date of the will, and had borne no children for the last 14 years, which was known to the testator. And the question was, whether these children passed under the will to Mrs. Puller; or, in other words, whether the term *increase* in a will conveyed the past as well as the future children. The Chancellor decreed in favor of Mrs. Puller, and the defendant appealed.

The court (*Coalter, Cabell, and the President*, delivering opinions) held, that the word *increase* ought to be construed to apply to the future offspring, if the expression be not enlarged by the context of the will, or other admissible evidence. See *Reno v. Davis*, 4 Hen. & Munf. 283.

Per Cabell, J., after observing the decree must be affirmed, said, there is not only no case fixing the import of the term *increase*, but it is most certain that when taken abstractedly, it is variously understood even among judges. Chancellor Wythe and Judge Fleming gave it an enlarged, and Judge Tucker and the Judge

The word "increase," in a will should generally be restricted to the future increase of the slave, but it may include children born before.

who preceded me, gave it a restricted interpretation. I am also inclined to believe, that it is generally used in the restricted sense, so as to embrace future increase only ; and although it is quite common to and expressly the term *future*, yet that is done out of abundant caution to remove all doubt upon the subject.

2.

BANKS' ADM'R v. MARKSBURY. Spring T. 1823. 3 Little's Rep. 275.

The owner of a female slave may give her to one of his children, and the future increase to another.

The administrator of Rachel Banks sued Marksbury *in detenue*, to recover sundry slaves.

The plaintiff claimed title under a deed of gift of Samuel Marksbury, which was in these words: "For and in consideration of love and good will I bear to my children, I give and grant to my son, Samuel Marksbury, my negro wench Pen ; and her increase from this time I do give to my daughter Rachel Marksbury." Rachel intermarried with William Banks, and the wench had several children, now held by the defendant. The court instructed the jury, that the plaintiff had no right to recover.

Per Cur. It is contended, that no interest in the slave in question passed by the deed, being her future increase which was given, and the donor had nothing in him to give at the time ; and that a man cannot make a good grant, or gift, unless the thing be in him at the time of the grant, according to the maxim *nemo dat quod non habet*. Without controverting the correctness of this maxim, or of the principle on which it is founded, we have no hesitation in saying, that it is inapplicable to the present case. He who is the absolute owner of a thing, owns all its faculties for profits or increase ; and he may, no doubt, grant the profits or increase as well as the thing itself. Thus, it is every day's practice to grant the future rents or profits of real estate ; and it is held, that a man may grant the wool of a flock of sheep for years. Noy's Max. 83. The interest which the donor's daughter Rachel took in the increase of Pen must, indeed, from its nature, have been contingent at the time of the gift ; but as the children of Pen were thereafter born, they would, by the operation of the deed, vest in the donee.

3.

RENO'S EX'RS v. DAVIS AND WIFE. November T. 1809. 4 Hen. & Munf. 283. ; KERNON v. ROBERTS, 1 Wash. Rep. 107. ; DAVIS v. MILLER, 1 Call, 127. ; SHELTON v. SHELTON. 1 Wash. Rep. 56.

The word increase in

THE case depended upon the construction of Reno's will, which

was in the following words: "Item, I give and bequeath unto my daughter, Jane Reno, a negro woman and her increase, named Sib, to her and her heirs forever." Before the date of the will, Sib had two children, and after the death of the testator had another; and the question was, whether the claimant was entitled to all the children, or only to the one born after the testator's death.

The court held, that the word increase, (without the word future prefixed,) in the bequest of a female slave, was ambiguous, and must be explained by the whole will taken together; and if the meaning of the testator cannot be discovered, then parol testimony may be admitted. See *Couts v. Craig*, 2 Hen. & Munf. 622; *Fleming v. Willes*, 2 Call's Rep. 5.

Per Fleming, J. The word increase may well be construed to include the children of Sib, born as well before as after the date of the will, and ought to be construed most favorably to the legatees, and to have the same import as if, instead of the word *increase*, he had used the word *offspring*. And I am rather inclined to believe, that all the children of Sib were intended to pass by the bequest, as the word *increase* precedes the name of the mother; and if the testator had intended that none should pass but those thereafter born, he probably would have bequeathed Sib and her future increase, which would have removed all doubt upon the subject.

4.

MARLIN v. MARLIN. August T. 1832. 3 Yerger's Tennessee Rep. 546.

On the 20th May, 1813, W. Lucas, of Orange county, Virginia, made and published his last will and testament. Among numerous bequests in the will, is the following: "I lend to my daughter, Rachel Marlin, three negroes, now in her possession, Hannah, Harry, and Major, during her natural life, and after her decease, I give unto all the children of Sarah Marlin, deceased, the negroes above named, to be equally divided among them, with all their future increase, to them, their heirs, &c. forever." By the same will he gave to his daughter Rachel Marlin, his negro girl Winney, then in her possession, with all her future increase. In eight or nine bequests of specified slaves in this will, is the same conclusion to each, "with their future increase."

Per Cur. Peck, J. The question raised by the pleadings and proof is, whether the offspring of the slaves named, born before

a will is ambiguous, and if it cannot be ascertained by all parts of the will taken together, it may be explained by parol testimony.

The words "future increase," in the bequest of female slaves, extend only to embrace such increase as are born after the bequest made, and cannot, by construction, be extended to embrace prior born increase.

the will, passed by the words in the bequest. It appears the slaves in controversy were born prior to making the will. The case of *Rind's Ex'r v. Davis and Wife*, 4 Hen. & Munf. 283., is, we think, decisive of the construction to be put upon this will. There the question was, whether the term increase carried with it the negroes previously born; but the court agreed in that case, that the terms "future increase," in the will would have put the case beyond doubt, and would have included only the after-born slaves. The word future, (so often repeated,) must be taken as having been intentionally and understandingly used by the testator when he was making his will. The estate claimed by the plaintiff was a remainder. Now, what remainder, it may be asked, after the death of Mrs. Marlin? To ascertain this, we are conducted to the property loaned for life, Hannah, Harry, and Major. These are given by name, and by number, "my three negroes;" and the conclusion of the clause, "the negroes above stated," negatives the presumption that others than those named were intended to pass in remainder. The testator must be taken as knowing his property at the time he is making these bequests. The children of Hannah in being, when he gave those named, are not of the life estate; and how shall they be, by any construction, made part of the remainder over? We find a bequest in the will of "Nan and all her children." If it was intended that the children of Hannah, with the exception of Winney, should pass, why not use the like words as those used in the bequest of Nan? The will is carefully drawn, and the repetition of the words, "future increase," added to the fact that previously born children were bequeathed in some instances, is not only persuasive, but conclusive, to show that it was not the intention of the testator to give prior increase with "Hannah, Harry, and Major," given by name. The death of these during the life estate may produce inequality in the distribution; but we are not to forget that the property is perishable; that it could happen to others of the devisees as well as to complainants. No foresight could guard against the contingency, or anticipate with certainty the length of Mrs. Marlin's life. Be these things as they may, we follow the obvious import of the words used, and accord with the construction given to like words, relating to like property, by all judges in a sister state. The decree must be reversed, and the bill dismissed.

5.

FULTON v. SHAW. January T. 1827. 4 Rand. Rep. 597.;
 SHELTON v. BARBOUR, 2 Wash. Rep. 64.; PEGRAM v.
 ISABEL, 2 Hen & Munf. 193.; MARIA v. SURBAUGH, 2
 Rand. Rep. 228.

Fanny Shaw brought an action to recover her freedom against Elizabeth B. Fulton. It appears that in 1788, John Fitzgerald, by a deed of emancipation, in pursuant to the act of 1782, relinquished his right to Mary Shaw, and declared her free; "reserving an absolute right or claim to all such child or children which the said Mary Shaw may hereafter bring, or may have born of her body." And the question was, whether Fanny Shaw, the child of Mary, was free, or a slave.

Where a female slave is emancipated, with a reservation that the future increase shall be slaves, the reservation is void.

Per Cur. Carr, J. Upon the execution of this deed, Mary Shaw became, to all intents and purposes, free, unless this effect was prevented by the subsequent reservation of an absolute right to any children she might afterwards have. It is clear, that it was not the intention of the grantor, by this subsequent clause, to modify or narrow the freedom before given. The clause relates solely to future increase. The deed bestows present freedom on Mary Shaw. The reservation had no present effect. It could only operate on a future contingency. Mary might never have children. In that case, the reservation would be a nullity. Would such a clause suspend, or in any way affect the freedom given immediately, and without qualification, by the former part of the deed? Unquestionably not.

We must give the instrument its true meaning, and that is exceedingly plain. The grantor meant to emancipate Mary Shaw, fully and immediately, and to hold in slavery any children she might afterwards have; and the only question is, not a question of *intention*, but of *power*. Could the grantor, by giving the mother perfect freedom, reserve to himself any interest in her future children? When a female slave is given to one, and her future increase to another, such a disposition is valid, because it is permitted to a man to exercise control over the increase and issues of his property within certain limits. But when she is made free, her condition is wholly changed. She becomes a new creature; receives a new existence; all property in her is utterly extinguished; her rights and condition are just the same as if she had been born free. After thus divesting himself of all property in the mother, the grantor

could not reserve to himself a right to hold her future progeny in slavery. A free mother cannot have children who are *slaves*. Such a birth would be monstrous, both in the eye of reason and the law. The reservation was therefore repugnant to the grant.

6.

HAMILTON v. CRAGG. June T. 1823. 6 Har. & Johns. Rep. 16.

The intent to give freedom to the issue will control.

Petition for freedom. It appeared that Rachel Turner bequeathed as follows. "Item, I give and bequeath unto my loving sister, Sarah Turner, five negroes, by name Frank, Joe, Bill, Mill, and Lin, to possess and enjoy during her natural life, them, and their increase; and my will is, that after my said sister's death, the above-named negroes be free." Sarah Turner bequeathed all her property to Hamilton, the appellant; and Cragg, the petitioner, is the son of Mill, and was born after the death of Rachel Turner, and during the life of Sarah Turner.

Buchanan, J., held, that by force of the words of the will, the petitioner was entitled to his freedom. There being no limitation over on the death of Sarah Turner, and the words, "the above named negroes," were intended to be used as words of description, not to be restricted to those who were before mentioned by name, but must be understood as applying to all who were the subject of the bequest, the issue as well as their mothers. They were all placed in the same state and condition during the life of Sarah Turner, and no difference in their condition after her death was intended, but were all of them the objects of the benevolence of the testatrix.

7.

MARIA v. SURBAUGH. Feb. T. 1824. 2 Rand. Rep. 241, 242.;

CATO v. DORGENNY, 8 Martin's Rep. 218. ; CHEW v. GARY, 6 Har. & Johns. 526.

The issue of slaves entitled to liberty at a future day, if born before the day, are slaves.

The rule is well settled in several of the states, and is taken from the civil law, that the issue of slaves entitled to future liberty, or entitled to it at a fixed time, or upon a contingency, if born before the period arrives, or the contingency happens, are slaves. And the same principle was decided in *Frank v. Milane*, 1 Bibb's Rep. 615.

8.

FRANK v. SHANNON'S EX'RS. Fall T. 1809. 1 Bibb's Rep. 615.

Suit for freedom. The children of Sibley, a slave in Pennsylvania, before the act for the gradual abolition of slavery, was duly registered there, and was taken to Virginia, and afterwards to Kentucky, where the children were born. The Court held, that the issue born in Kentucky of her were slaves; and that if they had been born in Pennsylvania, whereby an incipient right to freedom, under the laws of that state for the gradual abolition of slavery had attached, the removal to Kentucky would not have defeated that right to freedom which the law gave them. But the children here had never been in Pennsylvania, or subject to her territorial jurisdiction. The legislature of Pennsylvania have not attempted to extend the operation of their statutes to slaves born extra territorium, although the mother of them may have been registered under the operation of their laws.

The same principle has been adopted in Kentucky

9.

FANNY v. BRYANT. Oct. T. 1830. 4 J. J. Marshall's Rep. 368.

BANKS' ADM'R v. MARKSBERRY, 3 Little's Rep. 230.; HART v. FANNY ANN, 6 Monroe's Rep. 49.

The question was, whether Fanny, a colored woman, was free or not. George Smith, by deed dated 1798, emancipated his negroes. Some of them to be free immediately, and others at the future times specified in the deed. The mother of Fanny, and her increase, was to be free the 1st of January, 1816. Fanny, was born since 1798, and before 1816. The circuit court instructed the jury, that Fanny is a slave, and they found for defendant.

And the owner of slaves may grant freedom to their future increase.

Per Cur. Robertson, Ch. J. The maxim *partus sequitur ventrem*, does not apply to this case. If the grantor had been silent as to the "increase," and no intention to liberate the children could be inferred from the deed, then Fanny would be undeniably a slave, because her mother was a slave when she was born. In such a case, the issue would be born a slave, and, "*partus sequitur ventrem*," would fix her doom. But the grantor had the power to secure Fanny before her birth, all the benefits of freedom, and thus liberate her from hereditary slavery. Although it is a general maxim, that no one can give what he has not, nevertheless, the

owner of a thing, being entitled to all its capacities, may grant them to another: thus, the owner of a flock of sheep may grant the wool which shall grow on them. The owner of real estate, corporeal or incorporeal, may grant its future profits. The owner of a female slave may grant her future increase. In all such cases the grantor has a *potential* right to the thing granted, because he has the perfect right to the thing, of which it is the natural offspring, or to which it is incident.

As, therefore, the grantor could have granted to another a valid legal title to Fanny, by deed dated before she was born, he had an equal right to grant her to herself, or to grant to her *liberty*. Whether the grant would take effect, was contingent. It depended on her birth. The instant when she was born the grant operated, and it became certain and effectual on the first day of January, 1816. A deed of emancipation, liberating a female slave and "her increase," on a given day, *in futuro*, emancipates all her issue born after the date of the deed. Judgment reversed.

10.

BARRINGTON v. LOGAN'S ADM'RS. Fall. T. 1834. 2 Dana's Rep. 432. WILLIAMSON et al. v. DANIEL et al. 12 Wheat. Rep. 568. And see, FRANK ADM'S. v. MILANS' EX'RS 1 Bibb's Rep. 615.; and AMY v. SMITH, 1 Little's Rep. 326.

The rule of *partus sequitur ventrem* is universally followed.

Winney, Julian, and Henry Barrington, children of Dinah Barrington, a woman of color, who was born in Pennsylvania in 1800, and brought into Kentucky, where her children were born, brought suit against the appellee for their freedom.

The question depended upon whether Dinah, the mother, was a free woman or slave when the children were born.

The circuit supposed she was a slave until she arrived at 28 years of age, and the children being born before that period, they were slaves also.

On appeal to this court, they held, that all persons born in Pennsylvania since the act of that state for the gradual abolition of slavery took effect in 1780, were born free. Those, then, in slavery were continued so. Children born afterwards, who, but for the act, would have been slaves, became apprentices, with all the liabilities and immunities of apprentices, bound to serve those to whom as slaves they would have belonged, until they attained 28 years of age. And the court proceed: "We cannot doubt, then, that Dinah Barrington was born free, and never was a slave ;

and as *she* was never a slave, her children must be free. Had they been born in Pennsylvania they would certainly have been born free. The fact, that they were born in Kentucky cannot prejudice their natural and legal rights, for *partus sequitur ventrem* is the law of this state; and we know of no law, human or divine, which stamps slavery, a *nativitate*, on children whose mother was a free woman at the time of their birth. The only legal effect resulting from the fact that the appellants were born in this state, is, that their birthrights must be determined by the *lex loci*. Their mother having been a free woman at the time of their respective births, they, like all other children of free mothers, were by the law of the place of their birth born free *absolutely, at once, and forever*.

11.

M'CUTCHEEN et. al. v. MARSHALL et. al. January T. 1834.

8 Peters' Rep. 220. HOPE v. JOHNSON, *supra*.

The testator, M'Cutchen, devised to his wife, Hannah, all his slaves, provided that at her death they should be set free, and forever be liberated from slavery, with the exception of those who were not of age at the death of his wife, who were to remain under the control of the testator's brother and brother-in-law until they became of age, when they were to be set free. Rose, one of the female slaves, and her children, were to be set free on the death of his wife, absolutely and entirely. Eliza and Cynthia, two other slaves, had children born after the death of the testator, and before the death of his wife. Nothing was said in the will as to the children of Eliza and Cynthia. After the death of the wife, the heirs of the testator claimed all the slaves and their increase, to be distributed among the next of kin of the testator. They alleged in their bill, that by the laws of Tennessee, slaves cannot be set free by last will and testament. That if the law does not authorize emancipation, that they are still slaves until the period of emancipation; and that the increase born after the death of the testator, and before their mothers were actually set free, were slaves, and as such liable to be distributed. And the bill charged that Marshall, the defendant, being the legal representative, refused to distribute the said slaves and their increase among the next of kin. Marshall demurred to the bill, and the circuit court sustained the Demurrer, and ordered the bill to be dismissed; and the complainants appealed to this court.

Children born during a qualified manumission of their mothers, are born slaves.

Per Cur. Thompson, J. The laws of Tennessee authorize the emancipation of slaves in the manner provided for in the will of the testator. It is an admitted rule in the state of Tennessee, that the issue of a female slave follows the condition of the mother. If, therefore, Eliza and Cynthia were slaves when the children were born, it will follow as a matter of course that their children were slaves also. If this was an open question, it might be urged with some force that the condition of Eliza and Cynthia, during the life of the widow, was not that of absolute slavery, but was by the will converted into a modified servitude, to end upon the death of the widow, or on their arrival at the age of 21 years, should she die before that time. If the mothers were not absolute slaves, but held in the condition just mentioned, it would seem to follow, that their children would stand in the same condition, and be entitled to their freedom on their arrival at the age of 21 years. But the course of decisions in the state of Tennessee, and some other states where slavery is tolerated, goes strongly, if not conclusively, to establish the principle, that females thus situated are slaves; that it is only a conditional manumission, and until the contingency happens upon which the freedom is to take effect, they remain, to all intents and purposes, absolute slaves; and the court do not mean to disturb the principle. The children of Eliza and Cynthia must, therefore, be considered as slaves.

(V.) OF SLAVES CONSIDERED AS PROPERTY.

(A.) WHEN CONSIDERED AS REAL PROPERTY.

1.

M'DOWELL'S ADM'X V. LAWLESS. October T. 1827. 6 Monroe's Rep. 141.

Slaves are considered as real property.

Held by the court, that slaves devised pass as real estate immediately to the devisee; if not specifically devised, they pass to the personal representatives. The same principle was decided in Enlaw's Ex'r. v. Enlaw, 3 Marshall's Rep. 229,

2.

PLUMPTON v. COOK. Fall T. 1820. 2 Marshall's Rep. 450.

Plumpton sued out an attachment against Cook, as an absconding debtor; and, on motion of the defendant, the attachment was dismissed. One of the reasons was, that the bond recites an attachment against the personal estate, when the attachment produced is against the goods, chattels, and *slaves*.

And to purposes personal property.

Per Cur. The reason assigned by the circuit court must be predicated on the supposition, that between the recital in the bond of an attachment against personal estate, and the attachment as it issued being against *slaves*, as well as goods and chattels, there was an essential variance. But slaves are, in their nature, as much personal estate as goods and chattels, and are expressly made liable to an attachment. It is true, that by the positive law of this country, slaves are declared to be real estate; but by the same law, there are to that rule so many exceptions, that they may, at least in common parlance, and by common intent, be sufficiently described as personal estate. Judgment reversed.

3.

M'CAMPBELL v. GILBERT'S ADM'RS. October T. 1831.; 6 J. J. Marshall's Rep. 592.; GROVES v. LUCKY, 1 Marshall's Rep. 74.; JUSTICES OF MASON v. LEE, 1 Monroe's Rep. 251.; THOMAS AND WIFE v. TANNER, 6 Monroe's Rep. 58.; SNEED v. EWING AND WIFE, 5 J. J. Marshall's Rep. 48.

By statute they pass in wills as real estate.

Per Cur. Underwood, J. Since the passage of the act of 1800, (2 Dig. 1247.) requiring slaves to pass by last wills and testaments as real estate, an executor has no title in, or power over a slave specifically devised, unless some power is expressly reserved to him. And he cannot hire them out, or even take possession of them.

4.

CARROL et al v. CONNET. Fall T. 1829. 2 J. J. Marshall's Rep. 201.

Per Cur. Robertson, Ch J. The administrator is liable for failure to distribute slaves. Although for some purposes, slaves are declared by statute to be real estate, they are nevertheless intrinsically personal, and, therefore, are to be considered as included in every statute or contract in relation to chattels which does not in terms exclude them. They are liable as chattels to the payment of debts. They may be attached as chattels, and they have inva-

But are chattels for the payment of debts.

riably been treated as chattels, in both Virginia and Kentucky, so far as the rights and duties of administrators are concerned. *Redwood v. Reddick and Wife*, 4 Munf. Rep. 222. ; *Little's Sel. Cas.* 475. ; *Graves et al v. Downe et al*, 3 Monroe's Rep. 354.

(B.) WHEN CONSIDERED AS PERSONAL PROPERTY.

1.

HAWKINS' ADM'R v. CRAIG AND WIFE, Dec. T. 1827. 6 Monroe's Rep. 254.

The husband's right to the dower slaves of his wife on his death pass to his representatives.

Detinue for slaves. It appeared that Mrs. Craig, the wife of the defendant, was the widow of Singleton, and at his death became entitled to the slaves mentioned in the declaration as her dower in his estate ; that she afterwards married John Hawkins, who, for many years held possession of the slaves, claiming them as the dower of his wife in the estate of Singleton. And after Hawkins died, the slaves were held by his wife until she married Craig, the defendant. Administration was granted on the estate of Hawkins to the appellants, who claimed the slaves as having vested in Hawkins, but he refused to deliver them up, on the ground that the slaves survived to his wife on the death of Hawkins, and that the administrator had no right to them.

Per Cur. Owsley, J. If the right which the husband acquires in the dower of slaves of the wife, be of the same sort as that which he is entitled to in her dower lands, we would readily admit, that after the death of the husband it would survive to the wife, and not pass to the representatives of the husband. But slaves are for most purposes considered as chattels. There is one section of the act which goes explicitly to place the right of the husband to the interest of the slaves of his wife on the footing of chattels, and is taken from the acts of the Virginia legislature. The courts of that state have decided that husbands are entitled to the interest of slaves, whether belonging to their wives at the time of the marriage, or accruing to them during coverture, upon the footing of chattels. *Wallace and Wife v. Taliaferro and Wife*, 2 Call. 447. ; *Pinkard v. Smith and Wife*, *Little's Sel. Cas.* 331. ; *Banks v. Marksberry*, *Little's Rep.* 275. In neither of the cases to which we have referred did the question arise as to what right the husband acquired in the dower slaves of his wife, but they all involved the question of right in the husband to the slaves of his wife, and they all recognise the principle, that since the passage of the act of Vir-

ginia, from which the act of this country was copied, the husband is entitled to the same right to slaves owned by his wife at the time of marriage, or which accrue to her during coverture, that he would be entitled to, were they to every purpose chattels only, so that whether the wife has an estate in fee simple in a slave, or but an estate for life only, and whether she came to the estate by her own act, or by operation of the law, the principle is the same, and the right, be it greater or less, vests as chattels in the husband, if reduced to his possession during coverture. It follows, therefore, that if the slaves in contest belonged to Mrs. Craig, whilst she was the wife of Hawkins, and they were reduced by him to possession, though in right of his wife's dower, only the entire right of his wife vested in him, and at his death that right passed to the appellants, as his administrators.

2.

CHINN AND WIFE v. RESPASS. Fall T. 1824. 1 Monroe's Rep. 23.

Per Cur. Slaves were declared by law to be real estate, and directed to descend as lands descended to the heir at law. But it does not follow that the testator, by the devise of his personal estate, did not intend that his slaves should pass; for although slaves were by law made real estate, for the purpose of descent and dower, and perhaps some others, yet they had in law many of the attributes of personal estate. They would pass by a nuncupative will, and lands would not; they were liable to be sold for the payment of debts, and lands were not; they could be limited in a grant or devise no otherwise than personal chattels; and personal actions might be brought to recover the possession of them. Besides, they were in their nature personal estate, being moveable property, and such as might attend the person of the proprietor wherever he went; and in practice they were so considered and treated by the people in general. When, therefore, a man devised his personal estate, he must be understood to intend that his slaves should pass thereby, unless he used some expressions indicating a different intention.

Slaves pass under a general devise of personal estate.

3.

ENLAWS v. ENLAWS. Spring T. 1821. 3 Marshall's Rep. 228.

The court held, that the slaves of a female immediately on the marriage vests in the husband; and although she may survive him, her right to the slaves is not revived.

And they pass to the husband on the marriage.

4.

BEATTY v. JUDY et al. Spring T. 1833. 1 Dana's Rep. 101.;
 PLUMPTON v. COOK, 2 Marshall's Rep. 450.; CHINN et
 ux. v. RESPASS, 1 Monroe's Rep. 28.

And in
 contracts
 and wills
 the term
 "personal
 estate" in-
 cludes
 them.

Per Cur. Robertson, Ch J. It has been frequently said by this court, that the phrase, "personal estate," in wills and contracts, without any other restrictive expression or provision, should be construed as embracing slaves.*

5.

SNEED v. EWING AND WIFE. April T. 1831. 5 J. J. Marsh.
 Rep. 481.

And are
 considered
 assets.

Held by the court, *Robertson*, Ch. J., that slaves are, in every respect, except as to descents and last wills, personalty. They go to the administrator, and may be assets in his hands for payment of debts. And the heir cannot, without the assent of the administrator, maintain a suit for a slave of the intestate. They must be distributed according to the *lex domicilii*. See *Plumpton v. Cook*, 2 Marsh. Rep. 451.; *Hawkins v. Craig*, 6 Monroe's Rep. 257.

6.

JUSTICES OF MASON COUNTY v. LEE, 1 Monroe's Rep. 254.

And they
 are assets
 in the
 hands of
 executors,
 &c.

Held by the court, that, prior to the act of 1800, slaves though specially devised passed immediately to the executor, and were assets in his hands; but since the act they pass as lands absolutely to the devisee.

Held, also by the court, that slaves were assets in the hands of the administrator, and he represents them as completely with regard to controversies concerning their title, as he does any other chattel.

* Whether slaves are personal or real estate depends upon the local enactments in the different states. In South Carolina it is declared that slaves shall be taken, reputed, and adjudged in law to be chattels personal; 2 Brev. Dig. 220. but in Louisiana, they are real estate; 1 Martin's Dig. 612. in Kentucky as to the law of descents they are considered as *real estate*, but they are *chattels* for the payment of debts; 2 Litt. & Swi. 1115. and the cases in the text.

7.

CONCLUDE v. WILLIAMSON, ADM'R OF CONCLUDE, 1 J. J. Marshall's Rep. 16.

The legislature of Kentucky, in 1825, Sessions Acts, p. 195., passed an act declaring the plaintiff in error, Zacheriah Conclude, should be a freeman, and should inherit the estate of Isaac Conclude, his father, who, being a free man of color, had died without heirs. Zacheriah instituted this suit against Williamson, averring that he had in his possession \$200 assets, and praying for a decree for that amount. The administrator admitted in his answer, that he received of the estate \$100, but that he had paid it away in the purchase of a daughter of the intestate in pursuance of his wish often expressed. The circuit court dismissed the bill, and complainant appealed to this court.

And they do not escheat to the state as in case of real estate for defect of heirs.]

Per Cur. Robertson, Ch. J. A slave is not subject to escheat, but vests in the administrators or executors, as assets for the benefit of creditors. And the administrator, having assented to the act of emancipation, cannot urge any personal right to the party emancipated. The personal property of one dying without an heir is derelict.

(VI.) OF TITLE TO SLAVES.*

(A.) BY DEED.

1

DAVIS v. MITCHELL. Dec. T. 1833. 5 Yerger's Tennessee Rep. 281.

This suit was brought to recover a slave. The plaintiff proved that the slave had been given to him whilst an infant; that at the time of making the gift, possession of the slave was given to his

A deed registered is not necessary to pass title to a slave when possession follows and accompanies the gift or sale.

* Slaves may be sold and transferred from one to another without any statutory restriction or limitation, as to the separation of parents and children, &c., except in the state of Louisiana. Stroud's Sketch of Slavery in the different States, page 50. It is stated in Stephens on West Indian Slavery, that in the Spanish and Portuguese settlements, and in the French colonies by the *Code Noir*, that the husband cannot be sold without the wife, nor can the parents without the children. See Stephens' Slavery, p. 69. *Code Noir*, art. 47. Slaves may be sold by creditors for the debts of their owners in all the states but Louisiana, where they cannot be separated from the land. 1 Martin's Dig. 612. Act of July 7, 1806. The law was, however, the same

guardian, and that he had remained with his guardian for three years and more, before he came to the possession of the defendant. The plaintiff did not produce any deed or bill of sale which had been registered; none having been made. The court, among other things, charged the jury, that the act of 1784 was not repealed by the act of 1801, so that there was still a necessity for a bill of sale. The jury found a verdict for the defendant; and a motion for a new trial having been made and overruled, the plaintiff prosecutes this writ of error to this court.

Per Cur. Green, J. In this case the judge below, among other things, told the jury that "the act of 1784 is not repealed by the act of 1801, so that there is still a necessity for a bill of sale." Although the act of 1784 is not repealed, nevertheless, the succeeding sentence of the charge is too broad. A deed registered is only necessary where possession does not accompany the gift or sale. It has been constantly held, that where possession is delivered at the time a gift or sale of a slave is made, it is good as between the parties, and vests a title without a deed. 2 Hay, Rep. 62, 67, 87.; Cains & Wife v. Marley, 1 Yerg. Rep. 582. But from this charge it would seem the judge considered a bill of sale as necessary in all cases, in order to communicate title. In this he erred. Judgment reversed,

2.

ATKINSON v. CLARKE. Dec. T. 1831. 3 Devereaux's Rep. 171.
Supreme Court of North Carolina.

A deed of gift for slaves, which is not attested by a subscribing witness, is void.

This was an action of trespass, for taking from the possession of the plaintiff two negroes. The defendant pleaded not guilty, and put in a special justification under final process to himself as sheriff, against the property of one *Tunstal*. At the trial the plaintiff produced a deed of gift, dated the 18th of April, 1822, whereby *Tunstal*, in consideration of the love and affection which he bore to his daughter, the wife of the plaintiff, conveyed to the latter the slaves in dispute. This deed was signed and sealed by

as that which prevails in the United States, and in the British West Indies. Edwards' History of the West Indies, vol. 2. book 4. But in the Spanish, Portuguese, and French possessions it is different. Plantation slaves are real estate, and cannot be seized and sold separate from the land they cultivate. Stephens on Slavery, p. 68. *Annales de la Martinique*, tome 1. p. 295. Nor can the husband, wife, and children be separated. *Ibid*.

Tunstal, but was not attested by a witness, and was registered upon proof of the donor's hand-writing; and the plaintiff proved as possession of the slaves conveyed by it up to the year 1827. The Judge below instructed the jury, that neither the deed from Tunstal to the plaintiff, nor the possession under it, gave the plaintiff title; and the plaintiff appealed.

Per Cur. Ruffin, J. The superior court does not seem to have erred upon any of the points made in that Court.

The deed from Tunstal to the plaintiff is void. *Palmer v. Faucett*, 2 Devereaux's Rep. 240.

3.

SMITH et ux. v. YEATES. Dec. T. 1827. 1 Devereaux's North Carolina Rep. 302.

Detinue for a negro. On the trial the plaintiff offered in evidence the following paper, which was procured and registered.

"Received of Mariana Lewis ten dollars in cash, it being for a certain negro boy, Tony. May 18, 1822.

"JAMES JOHNSON."

The wife of Johnson proved that *Mariana Lewis*, who afterwards intermarried with the plaintiff, resided with her at the house of her husband; that before the date of the instrument she had heard Johnson express an intention of giving Tony to Mariana. That on the 18th day of May, 1822, Johnson repeated this declaration, but observed, that he could not give the negro, unless some money was paid him by Mariana, and said if she would give him ten dollars, *Tony* should be hers. Mariana replied that she had not the money; he told her that she could borrow it of his wife. The money was accordingly produced by the witness, and handed to Mariana, who gave it to Johnson, upon which he wrote the instrument, and delivered it, the boy being present. The defendant claimed title under the will of Johnson, of a subsequent date. His honor instructed the jury, that to constitute a valid bill of sale, the instrument must contain some words showing an intention of passing the property. That if the writing was not a good bill of sale, they were to inquire from the evidence whether there had been a sale, and an actual delivery. If there had been a sale accompanied with a delivery, the property in the slave passed, notwithstanding the act of 1821, although there was no bill of sale. And that lending, or even giving the money, by Johnson's wife, would

The act of 1806, requiring gifts of slaves to be authenticated by writing, cannot be evaded by a fictitious sale; therefore where the donor gave the donee the purchase money, and then sold and delivered the slave, receiving back the money—this was held to be a gift, and void without a deed.

not invalidate an actual sale, accompanied by a delivery. The counsel for the defendant moved the judge to instruct the jury, that if they thought the ten dollars was not in fact lent, or given, by *Johnson* to *Mariana*, and that he did not mean to give her credit for the amount, but furnished them to her, and received them back, mere colorably, and to make a gift under the pretence and form of a sale, that the property did not pass. The judge declined giving such instructions, and the jury returned a verdict for plaintiff, whereupon the defendant appealed.

Per Cur. Hall, J. With respect to the act of 1821, concerning the sale of slaves, accompanied with a delivery, the inclination of my mind is with the judge below. I also agree with him that the receipt is inoperative, as a bill of sale, if for no other reason, because it has no subscribing witness to it. Rev. ch. 225. For the same reason it cannot be supported as a deed of gift. Rev. ch. 701. The question then is, was there a sale and delivery of the negro in dispute.

The receipt is evidence that ten dollars was paid, but the circumstances attending the payment are before us. From them it appears that there was, in fact, no payment made by the plaintiff.

The money was in reality paid by *Johnson* to himself, so that, although the jury found a delivery, the payment did not amount to such consideration as to make it a sale of the slave. If, then, there was a delivery, but upon no consideration, it was a gift; but that, by the act of 1806, Rev. ch. 701., is void, because not authenticated by deed. A sale, completed by delivery, requires no such evidence. Disguise this case as you will, it is only a gift. If it is considered as a sale, the act of 1806 may be evaded by the consideration of a pepper corn. Judgment reversed.

4.

PALMER v. FAUCETT. Dec. T. 1829. 2 Devereaux's North Carolina Rep. 240.

The 7th section of the act of 1784, (Rev. ch. 225,) requiring sales and gifts of slaves to be in writing, attested by a witness, and regis-

Detinue for a slave. After the plaintiff had made out his case, the defendant proved, that upon his marriage with a daughter of the plaintiff, in the year 1821, the slave in question had been put into his possession by the plaintiff; that this possession continued, until the year 1825, when the plaintiff received the slave again, and hired him for a part of the years 1825 and 1826. After which the slave was again permitted to go into the possession of the defendant. There was proof that the plaintiff sent to the defendant

a writing respecting the negro, but whether it was a letter or a bill of sale, the witness did not know. There was also proof of the loss of this instrument, and it never had been registered. The defendant relied upon his possession for three years under the act of 1820, Rev. ch. 1055., as a validation of his title, supposing it to be defective. His honor instructed the jury, that as the act of 1806 avoided all gifts of slaves unless in writing, signed by the donor, and attested by a witness, so, a possession of a slave for three years, held under a gift not evidenced, as that act required, would not confer a title under the act of 1820; that every possession of property must either be consistent with, or in opposition to the title. Where the possession is acquired with the consent of the owner, it constituted the contract of bailment. Where the parties intended to convey the titles, but made use of a mode inoperative and void, the ownership remained unchanged, and the possession being still taken by the consent of the owners, forms a bailment; and that supposing such contract to have been constituted when the negro was first received by the defendant, it must have been ended, and three years' possession have occurred since its dissolution, to enable the defendant to acquire a valid title under the act of 1820. A verdict was returned for the plaintiff, and the defendant appealed.

Per Cur. Hall, J. The act of 1784, Rev. ch. 225. sec. 7., from its preamble and the adjudications upon it, was passed principally for the protection of creditors and purchasers. The preamble is as follows: "Whereas many persons have been injured by secret deeds of gift to children and others, and for want of formal bills of sale for slaves, and a law for perpetuating such gifts and sales." It then provides for the registration of such deeds, and that they shall be attested by one credible witness at least. The construction put upon the act, that it was made for the benefit of creditors and purchasers, is evident from the cases of *Knight v. Thomas*, 1 Hay. Rep. 289.; *Cutler v. Spiller*, 2 Hay. Rep. 61.; *Lynch v. Ashe*, 1 Hawks' Rep. 338.; *Rhodes v. Holmes*, 2 Hawks' Rep. 193.; *Bateman v. Bateman*, 1 Car. Law Repos. 85. Consistently with this construction of the act, the act of 1792, Rev. ch. 363., declares, that all sales of slaves bona fide made, and accompanied with actual delivery, shall be good without any bill of sale. According to the cases before cited, it was not necessary, as between the parties, that there should be a bill of sale; or if there was one, that it should be attested by a subscribing witness; or if so attested, that it should be registered. Judgment affirmed.

tered, was passed for the protection of creditors and purchasers only. Under it, a gift or a sale is good between the parties without a deed properly attested, and if by deed thus attested, without its being registered.

5.

PEABODY et al. v. CARROL. Feb. T. 1821. 9 Martin's Louisiana Rep. 295.

When the sale of a slave is unattended with any real, fictitious, or conventional delivery, he is still liable to be attached for the vendor's debt.

Per Cur. Mathews, J. In this suit, which was originated by attachment, two slaves have been seized as the property of the defendant, and are claimed by A. Haynes, as belonging to him. In support of his claim, he offers in evidence a bill of sale from the defendant, the fairness and genuineness of which seems not to be disputed. But it does not appear that the sale was attended with a delivery of the property.

There is a provision in our statute relating to the tradition or delivery of slaves, which states, that it may take place, either by actual delivery made to the buyer, or by the mere consent of the parties, when the sale mentions that the thing has been sold and delivered. *Civ. Code*, 350. art. 28. The bill of sale produced by the claimant contains no clause expressive of such consent of the parties as prescribed by the law cited. It is in evidence, that the slaves were not, at the time of executing the sale, in the actual possession of the vendor; but were on board of a keel-boat then descending the Mississippi, according to the testimony of Green, a witness examined in the cause; and according to the bill of sale, they were hired on board of the steamboat Gen. Jackson. If this sale is to be considered as a contract entered into and completed in the state of Tennessee, which is by no means clear, we have no evidence before us of the *lex loci*, and must, consequently, decide the case in conformity with the laws of the state where the property is found, and the suit commenced. In doing this, there is little difficulty, if we adhere to former decisions in similar cases, by which it has been established, that before actual delivery of the thing sold, it may be attached by the creditors of the vendor. *Durnford v. Brooke's Syndics*, 3 Martin's Rep. 222. *Mumford v. Norris*, 4 ib. 25. As there has been no delivery of the slaves, either real, fictitious, or conventional, we are of opinion, that the district court is erroneous in denying them to the claimant.

6.

PALMER v. FAUCETT. Dec. T. 1829. 2 Devereaux's North Carolina Rep. 240.

The act of 1806, (Rev. ch. 701,) avoiding gifts of

Detinue for a slave. After the plaintiff had made out his case, the defendant proved, that upon his marriage with a daughter of the plaintiff, in the year 1821, the slave in question had been put into his

possession by the plaintiff; that this possession continued until the year 1825, when the plaintiff received the slave again, and hired him out for a part of the years 1825 and 1826. After which the slave was again permitted to go into the possession of the defendant. There was proof that the plaintiff sent to the defendant a writing respecting the negro, but whether it was a letter or a bill of sale, the witness did not know. There was also proof of the loss of this instrument, and it never had been registered. His honor, the judge, charged the jury, that the plaintiff having shown a title in himself, that it was incumbent on the defendant to show that it was devested; and as the latter claimed under a gift, since the act of 1806, he ought to satisfy them that the gift was in writing, signed by the donor, and attested by a witness subscribing it; and further, that in law a circumstance not made to appear was taken as not existing. A verdict was returned for the plaintiff, and the defendant appealed.

slaves unless in writing, attested by a subscribing witness and registered, is a statute of frauds made for the protection of donors, and under it a deed is inoperative against the donor, unless duly attested and registered.

Per Cur. Hall, J. The act of 1806, Rev. ch. 701., "declaring what gifts of slaves shall be valid," was made, as it emphatically declares, "for the prevention of frauds," and may be fitly called a statute of frauds. It declares, that no gift of slaves hereafter to be made, shall be good or available in law or in equity, unless the same be made in writing, signed by the donor, attested by at least one subscribing witness, and shall be proved or acknowledged as conveyances of land, and registered within one year. This act was made, not only for the benefit of creditors and purchasers, but also for that of donors. It must be well remembered what a fruitful source of litigation parol gifts, and pretended parol gifts, were before the passage of this act; and that, too, in many cases where creditors and purchasers were not concerned. To remedy that mischief the law was passed for the benefit of donors. And in proportion as any of the requisites of the acts are dispensed with, so in proportion will the mischief be left without remedy. In the present case, between the donor and donee, if there had been a deed of gift, and that deed had been registered, although the deed were lost, there would be no difficulty in procuring a copy of it. If deeds of gift have been *bona fide* executed, injury is done to no one by registering them. Mischief may be done by concealing them until after the death of the donors. But the act is positive, that such deeds shall be registered as conveyances of land. This clears the question of doubt; because nothing passes by convey-

ances of land, or shall be good and available in law, unless the same shall be acknowledged, or proved, and registered.

I am, therefore, of opinion, after full reflection, that the instructions given by the judge to the jury, on the trial in the court below, were correct. It is true, that what I said in *Justice v. Cobbs*, 1 Dev. Rep. 469., on the question of adverse possession, was extra judicial. The question involved in the decision of that case did not require it. That was the case of a possession where there was no parol gift proved. But it is a warning lesson not to speculate on supposed cases. Judgment affirmed.

7.

THOMAS v. SOPER, Feb. T. 1816. 5 Munf. Rep. 28. ALEXANDER v. DENEALE, 2 Munf. 341.; ROBERTSON v. EWEILL, 3 Munf. 1.; HAMILTON v. RUSSEL, 1 Cranch. Rep. 315.; HOWATT v. DAVIS et al., 5 Munf. Rep. 34.

An absolute deed of slaves where the grantor remains in possession after the execution and recovery of it, is fraudulent and void as to creditors and subsequent purchasers, yet it cannot be impeached by the parties or their representatives.

Detinue for slaves. The plaintiff offered in evidence an absolute deed from James Thomas, sen., of whose estate the defendant was administrator. The defendant offered evidence to impeach the deed as fraudulent, and that James Thomas held the slaves from the time of executing the deed to the time of his death; and that the defendant, qualified as administrator of Thomas, and that the negroes came to his possession as administrator, and that *nulla bona* had been returned to an execution against the estate of Thomas. The court rejected the evidence, and instructed the jury, that although in the case of an absolute deed for negroes where the vendor remains in possession after the execution, and recording the same, such deed as to creditors and subsequent purchasers is to be regarded as fraudulent and void; yet, between the vendor and vendee, and their immediate representatives, it was obligatory, and could not be impeached by the testimony offered by the defendant as administrator of the grantor, which defendant was not himself a creditor. To this opinion of the court a bill of exceptions was filed, and a verdict being found, and judgment rendered for the plaintiff, the defendant appealed to this court, which affirmed the judgment. And see *Thomas v. Soper*, 5 Munf. Rep. 58.; where the court say, that, although in case of an absolute deed of slaves where the grantor remains in possession after the execution of the deed, it is fraudulent and void as to subsequent purchasers and creditors; yet the same is obligatory, and cannot be impeached, as between the grantor and grantee and their representatives.

8.

RAGAN v. KENNEDY. Nov. T. 1804. 1 Overton's Rep. 91.

Harrison, by a bill of sale transferred a negro to the plaintiff, and a lot. Harrison being married to the plaintiff's daughter in April, 1798. A judgment was obtained against Harrison, and another in March T. 1801, and a fi. fa. issued returnable to March T. 1802. The sheriff sold the negro, as the property of Harrison, to Kennedy, the defendant, and this action of detinue was brought against him to recover the slave.

And where the possession is inconsistent with the bill of sale, it is void as to the interest of third persons.

The court held, that a bill of sale of slaves made by a person indebted, who retains possession after the execution of the bill of sale, is void against creditors, although a valuable consideration may have been received. The court say, in conveyances of personal property the law supposes a transfer of possession. In subjects of this nature, two views present themselves: one as between the parties themselves, and those claiming directly under them; the other, as it respects such individuals as may stand in a relation to be affected by the transaction. In the first, delivery of possession may not be necessary; in the latter, it is usually otherwise.

9.

MADRY v. YOUNG. Oct. T. 1831. 3 Louisiana Rep. 160.

This was a suit instituted by Madry to recover of the defendant a negro slave named Jack. It appeared the defendant was once the owner of Jack, but exchanged him, in the state of Mississippi, with one Dawson for a slave named Aaron. Dawson being unable to make a complete title to Aaron, Young refused to make an absolute title to Jack. Dawson executed an instrument which was recorded in Mississippi, where the transaction took place, in which he reconveys Jack to Young; but this conveyance, to be defeasible, if he, Dawson, made Young a good title to Aaron, Dawson remaining in possession of Jack, sells him to one Hunter, who sold him to Madry; each sale being accompanied with delivery. Young now claims Jack, and alleges Dawson had no authority to sell him.

Where the vendee suffers the vendor to retain possession, and he sells and delivers the thing sold to a second vendee, the latter will hold in preference to the first.

Per Cur. Martin, J. Nothing is clearer than that, if the vendee suffers the vendor to retain possession, and he sells and delivers the thing sold to the second vendee, the latter will hold it in preference to the first. In the sale of a slave in a state where the property passes by verbal sale and delivery, if the vendee suffers

the vendor to retain possession, and he sells and delivers the thing sold to a second vendee, the latter will hold it in preference to the first. And where the sale is accompanied with delivery and payment of the price, it transfers all the vendor's right and interest.

10.

BRAXTON v. GAINES et al. Oct. T. 1809. 4 Hen. and Munf. 151.

Where the purchaser is an infant, and resides with her father.

The court held, that where a daughter who was an infant, and held as purchaser for a valuable consideration of a slave, the fact that such child resides in the family of the father, and there keeps the slave, and exercises acts of ownership over it, the creditors of the father cannot disturb the possession of the child, although the father had included the slave in a mortgage to indemnify persons for becoming his sureties. She is considered a purchaser for a valuable consideration, and not a volunteer. See post, tit. "Possession."

11.

BATTE v. STONE. March T. 1833. 4 Yerger's Tennessee Rep. 168.

A deed of gift for slaves is void as to a subsequent purchaser, unless proved by two witnesses.

This was an action of detinue, commenced in the circuit court of Giles county, by the defendant in error, to recover from the plaintiff in error a slave by the name of Mary. From the bill of exceptions the following facts appear: The father of the defendant in error executed to him a deed of gift for the slave in controversy, to which there were three subscribing witnesses. The deed was proved within the time prescribed by law, by one of the subscribing witnesses, and registered. At the time of its execution, defendant in error was a minor, living with his father. Some time in 1827, the father of defendant in error sold the slave to the plaintiff in error, for a valuable consideration. Upon the trial of the cause, the defendant in error offered an office copy of the deed of gift in evidence. The production of the original was waived; but the deed was objected to, because it was only proved by one witness. The court overruled the objection; to which exception was taken, and the defendant in error, having a verdict and judgment, the defendant below appealed in error to this court.

Per Cur. Cairon, Ch. J. The main question in this cause is, whether the deed of gift, by virtue of which plaintiff claims title to the negro sued for, was properly admitted as evidence to the jury,

It was made, in 1824, from the plaintiff's father to him, and purports to have had three witnesses to it. At May term, 1824, it was proved in the Sumner county court, by Edward Elliff, one of the subscribing witnesses, and certified for registration; and on the first of July, 1824, on this probate, registered. An office copy was offered, and objected to, because proved by one witness only, but received. Was the proof of one witness sufficient to authorize the registration? The first act requiring two witnesses to instruments required to be registered, is that of 1805, ch. 16. sec. 2., which applies to the settlement of slaves, or other personal property, in consideration of marriage. The act of 1807, ch. 85. sec. 3., is, in this case, the governing provision. In the mode of proof to authorize registration, there had been no difference in cases of transfers of lands or slaves before 1807, and it is manifest the act of that year did not intend to make any. As to lands, it is clear, two witnesses are required; the deed is to be proven by at least two subscribing witnesses, "and all bills of sale or other instruments of writing for the transfer of personal property, shall be so proven." The seventh section provides for the registration of deeds, theretofore made, on the proof of only one witness, because, until 1805, in no case had more than one been required. The proof by one witness did not authorize the registration of the deed; consequently, the copy offered in evidence was incompetent to go to the jury. Judgment reversed.

12.

PIERCE v. GRAYS et al. Feb. T. 1818. 5 Martin's Louisiana Rep. 367.

Per Cur. Mathews, J. The plaintiff, and appellant, claims two slaves from the defendants. On the 17th of August, 1809, he purchased from Philip A. Gray, father of the defendants, eighteen slaves, and among them, the two now claimed, as having always remained in the possession of the vendor, or his heirs. On the next day he executed a deed of gift in favor of Mayo Gray, and Sarah A. Gray, infant children of the vendor, for said slaves. The property remained in this situation till the 17th of September, 1814, when the donor seems to have changed his benevolent intention towards the donees, and declared, before the judge of the parish of Feliciana, his will and desire to revoke and annul "the deed of gift executed by him in the year 1809, before Wm. Lewis, syndic of the district of Feliciana, then under the government of Spain."

In Spain, a donation to an infant, of slaves delivered to the donee's father, is irrevocable, although he does not formally accept the gift.

The fact of the written donation executed by the plaintiff appears so conclusively, by the introduction of the instrument intended as a revocation of the donation, that it is thought unnecessary to notice the bill of exceptions of the defendants, on the introduction of parol evidence, to prove the acknowledgment of the plaintiff to that effect. The only question of law which arises out of these facts is, whether the donation was perfect and irrevocable, without any formal acceptance, for the infants by their father, or some other person.

According to the rules laid down on the subject of donations, *inter vivos*, it is clear, that the donor is bound, only from the acceptance of the donation, in precise terms, and that it produces no effect, except from the day of the acceptance. Civ. Code, 220. art. 54. Were the case to be decided by these rules, it is probable that the judgment of the district court would prove to be an erroneous one. But we are of opinion, that our code does not properly exhibit the rules by which the point in dispute between the parties must be settled. The contract was made under the Spanish government, and the municipal laws of Spain are alone applicable to it. These, it is believed, are not so rigorous as our statute in requiring a formal acceptance, in order to give validity to a donation, or to render it perfect and irrevocable; except in the cases laid down as ingratitude, a change of situation in the donor, who has given the greatest part of his estate, the subsequent birth of children, &c., which apply to donations, complete as to form. Gomez, in his *Variae Resolutiones*, lays it down, on the subject of donations, that they are executed in two modes: by delivery, or promise. By delivery, *quando nulla precedente promissione vel obligatione quis tradit suum rem alteri causa donationis; quid tunc statim valet et perficitur donatio; et transit dominium et plenum jus rei, in accipientem; ex titulo et causa donationis*. A donation by promise is when a person obliges himself to give or deliver something to another. If a donation, accompanied by the delivery of the thing, be complete and perfect, it follows, as a necessary consequence, that it ought to be considered as irrevocable on the part of the donor, unless for causes authorized by law. The donation made by the plaintiff, and appellant, was not accompanied by any formal delivery of the slaves given to the appellees, or any person for them; but they were left in the possession of their father, who held them before the execution of the deed of gift to his infant children. He was the proper person to have received the dona-

tion for them ; and having already the possession of the slaves, no formal delivery was necessary to transfer the dominion of them in full right to the donees. We consider the slaves as having been in the possession of the father, under the donation to his children, and held for them, from the time of the execution of the deed of gift, to the commencement of this action. Was a formal, written acceptance of the donation necessary, on the part of the donees, under these circumstances, to render it irrevocable by the donor ? The court is of opinion, that it was not. It is very doubtful whether, by the laws of Spain, a formal acceptance be necessary in any case where the delivery of the thing accompanies the donation. But in cases of minors, infants, and absent persons, no acceptance is necessary to render the donation irrevocable, according to Gomez. (Treatise on Donations, p. 3.) It is true, that in a donation to an absent person, it seems required that the title or deed be transferred to the donee, in order to render the donation irrevocable ; or that a clause be introduced, by which the notary, or officer before whom it is made, be requested by the donor to accept it for the absent persons, and that he then takes it as if accepted in due form. Febrero, 1. 5. n. 19. These regulations are confined to absent persons ; and we find in the same books, (n. 30.) that a donor cannot revoke a donation made in such a manner so as to substitute a third person to the donee, when the substitute is an infant. From this view of the case, we are of opinion, that the judgment of the district court is correct.

13.

GARRETT V. HUGHLETT. April T. 1800. 1 Har. and Johns. Rep. 3.

The court held, that a bill of sale of negroes might be deemed fraudulent from other circumstances than the continuance of possession. The act of assembly, by requiring the bill of sale to be acknowledged and recorded within a limited time, intended by those circumstances of notoriety to take off the presumption of fraud arising from the vendor's continuing in possession. But if there were other circumstances attending the transaction, which tended to show it fraudulent, those circumstances might be given in evidence.

A bill of sale of negroes may be deemed fraudulent from other circumstances than the vendor's continuing in possession.

14.

PIERCE v. CURTIS et al. March T. 1819. 6 Martin's Louisiana Rep. 413.

If a slave, sold, remains with the vendor, he is liable to be seized for his debts.

Per Cur. Matheus, J. In this case the plaintiff, and appellant, sues for the recovery of a slave, described in the petition. The action was commenced against Curtis alone, who, at the time, had possession of the slave. Gayles, the other defendant, intervened, and claimed the slave, in his answer, as his own, suggesting fraud in the transaction, by which the plaintiff obtained his title to the slave. Both Pierce and Gayles claim the slave under Curtis. The evidence on record shows the following facts :—On the 21st. of October, 1813, Curtis, by a notarial act, sold the slave in question to Abner Stanley, and retained a mortgage for his payment. It does not appear that the sale was attended with any tradition ; but Curtis held possession of the slave till August, 1814, when Stanley, at his instance, conveyed to Pierce, by a notarial act, all the title which he acquired by the act of sale in 1813. After this, Curtis continued to possess the slave, as his own, until some time in 1815, when the sheriff of East Baton Rouge sold him, under an execution, upon and against the property of Curtis, and Curtis purchased him, at the sheriff's sale. On this statement of facts, the only question to be decided is, whether the slave sold, thus remaining with the vendor, and never having been delivered to the vendee, was, or not, liable to be seized and sold to satisfy the debt of the former. The case of Durnford v. Brook's Syndics, 3 Martin's Rep. 222. 259., is relied upon by the counsel of the defendant, and appellee, Gayles, and is certainly completely applicable to the present case, except that in the former the things sold were merchandise, which pass by a mere verbal agreement and delivery, whereas, the dispute is now about a slave, the title to whom has been transferred by public and authentic acts. But we are of opinion, that this circumstance cannot operate against third persons, such as creditors, so as to defeat their just claims founded on principles recognized in the above case. There is not any evidence that the slave was ever delivered to Pierce, or that the latter ever exercised any act of ownership over him, except that which is derived from an extra-judicial acknowledgement of Curtis, whose interest it is to countenance the forced sale by which he was to be benefited. It is true that, according to our statute, the delivery of a slave who is sold takes place when it is really made to the buyer, or by the mere consent of the parties ; when the sale mentions,

that the slave has been sold and delivered to the buyer, or when he was already in possession under another title. Civ. Code, 350. art. 28. But this constructive delivery does not appear from the expressions of the act of sale, and there is evidence that the slave remained in the possession of the vendor.

15.

DORSEY v. GASSAWAY. June T. 1809. 2 Har. & John's Rep. 402.

Held by the court, *Chase*, Ch. J., that if slaves remain in possession of the vendor, the bill of sale must be recorded; and whether they remained in his possession is a matter of fact for the jury. If they find they were not in his possession, the bill of sale is not required to be recorded, and is not evidence, although it was recorded, unless the execution of it be proved.

And whether the slave remains with the vendor or not, is a matter of fact.

16.

RICE v. HANCOCK. Nov. T. 1824. 1 Harper's Rep. 393.

The defendant gave an absolute bill of sale of a slave, which stated a past consideration. The court held, he was not precluded from showing that no consideration was in fact paid.

The consideration of the deed may be inquired into.

Per Cur. Gantt, J. The consideration paid for the negro might, or might not, have been inserted in the bill of sale, and the transfer in law would have been as effectual one way as the other. The insertion is more a matter of form than substance, and in no event can preclude the party from inquiring into it. Had the defendant offered evidence to show that the bill of sale was intended to transfer a less interest than what was expressed therein, or that another negro than the one described was intended, &c. then such evidence would be in contradiction to the deed, and not admissible. In transactions of this kind it is well known that the consideration expressed in the instrument is not always paid down, but secured by bond, note, or verbal promise, and it is the business of the purchaser to fortify himself with evidence of having paid the consideration agreed to be given.

17.

MONDAY v. WILSON et al. August T. 1832. 4 Louisiana Rep. 338.; S. P. TRAHAN v. M'MANUS et al., 2 Louisiana Rep. 209.; and see, 9 Martin's Rep. 648.; 6 Martin's Rep. N. S. 324.

Per Cur. Mathews, J. In this case the Plaintiff claims two slaves, which are in the possession of the defendant. The for-

Where the vendor of

mer sets up a title derived from Morgan, evidenced by an authentic act passed before the parish judge of East Feliciana. The defendant claims the same property in virtue of a sheriff's sale made by the sheriff of St. Helena, in which it was sold as belonging to the vendor of the plaintiff. The cause was submitted to a jury in the court below, who found a verdict for the defendant, and judgment being rendered thereon, the plaintiff appealed.

The evidence of the case shows that the slaves in question were on a plantation, situated in the parish of St. Helena, belonging to Morgan, under whom both parties to this suit claim title; one by a voluntary sale, the other by a forced sale, made under execution by the sheriff of the parish aforesaid. The sale to the plaintiff was made to the plaintiff on the 18th of October, 1830. The sheriff's sale took place in January, 1831, and was made under an execution which issued on a judgment confessed by Morgan in favor of the defendant Wilson. The validity of the sale is contested on the ground of irregularities in the proceedings of the sheriff, he not having pursued the formalities required by law necessary to give effect to forced alienations of property under our judicial proceedings. Whether the regularity of the course pursued by the sheriff, in the sale by him made, could, under any circumstances, be inquired into in the collateral manner in which it is here presented, need not be examined in the present case, as the court is of opinion that the plaintiff in the execution did not adopt the means afforded him by law to render the property now in dispute liable to be seized and sold under his execution.

The sale from Morgan to the plaintiff is by authentic act, made in due form, a fair price stipulated for the slaves sold, a mortgage reserved on them to secure payment, and the deed contains a declaration that they have been delivered to the buyer.

In addition to this clause of delivery, the record shows that the purchaser had possession of them, as agent or manager of the plantation of the seller; and, as stated by the witness, William, had the management of these identical slaves in the fall of 1830.

On the subject of tradition or delivery of the slaves, it is stated in article 2484 of the Louisiana Code, that it takes place in three ways: "Either by real delivery made by the buyer, or by the mere consent of the parties, when the sale mentions the thing sold has been delivered, or when the buyer was in possession under another title." But the article 2456, provides, "that in all cases where the thing sold remains in possession of the seller, because

he has reserved the usufruct, or retains possession by a precarious title, there is reason to presume that the sale is simulated, &c. Now, it appears to us, that when the seller remains in actual possession without a reservation of usufruct, retention of the property sold under color of any precarious title, the same, or perhaps a stronger reason may exist to induce a belief that the sale was simulated and fraudulent. Indeed, it is believed to be a principle recognized in all systems of jurisprudence, that where the seller of property keeps possession, this circumstance constitutes an *indicium*, or badge of fraud in relation to third persons; and perhaps property thus circumstanced might be legally seized by creditors of the vendor, without compelling them to resort to actions of nullity to set aside such contracts, and that the mere mention of delivery in the act of sale ought not to defeat the right which creditors have to seize property as belonging to a vendor before tradition. In the present instance before the purchaser is shown to have been in possession of the property sold, under another title than that acquired by the sale, viz. as agent for the seller. Thus situated, the slaves, which were apparently the property of the plaintiff, both by sale, evidenced by notorial act, and by actual possession, could not legally be seized as belonging to the defendant in execution, by the judgment creditor, without causing the sale of the plaintiff to be annulled by an action directly instituted for that purpose,

(B.) BY DEVISE.*

1.

UPSHAW v. UPSHAW et al. April T. 1809. 2 Hen. and Munf. 381.

The court held, that a husband dying in the life time of the wife, had no right to devise away slaves to which she is entitled, as devisee in remainder or reversion, the particular estate not having expired, though he may in his life time *sell* her interest in them for

A husband cannot devise slaves to which he is entitled in right his wife

* Slaves are devisable like any other chattel. A distinction, however, exists where slaves are considered as real property. In those cases they pass immediately to the legatee, and not to the executor as personal estate. The moment they are considered *property* they are of course subject to those rules of enjoyment of it by the possessor, and transmission from one to another, the common law has established, or the legislature has declared. With respect to a devise to a slave, it is held in all the states but Maryland, that such devise is void. Slaves cannot take by sale, devise, or descent. Cunningham v. Cunningham, C. & N. 353. So also a devise for the maintenance of slaves is void. 1 Taylor's Rep. 209; Pleasants v. Pleasants, 2 Call's Rep. 319;

a valuable consideration. The same principle was settled in *Wallace and Wife v. Taliaferro*, 3 Call. 447. And Tucker, J., observed, that the principle was not affected by *Dade v. Alexander*, 1 Wash. Rep. 30.

2.

EWING'S HEIRS v. HANDLEY'S HEIRS, Fall T. 1823. 4 Little's Rep. 346.

When grand children may take by the description of children.

Held by the court, that grand children might claim under a devise of slaves by the description of children; but the claim will only be valid where there are no children to answer the description. And see *Pringle v. M'Pherson*, 2 Dess. Rep. 524., where the court held, that a bequest of certain slaves by name, with "*their families*," was under the circumstances restricted to their wives and children residing in the same house with them, and should not be extended to grand children.

3.

MASON v. MASON'S EX'RS. Fall T. 1814. 3 Bibb's Rep. 448.

After-purchased slaves do not pass by the will, unless it appears to be the intent of the testator.

Mason made his will, and afterwards purchased two slaves, and the question was, whether these after-purchased slaves passed by the will.

Per Cur. Owsley, J. We are of opinion that the slaves did not pass under the will; they descend as if no will had been made. The rule would be otherwise, where it appeared plainly by the will that it was the intention of the testator that they should pass under it.

Walker v. Bostick, 4 Dess. Rep. 266.; *Brandon v. Huntsville Bank*, 1 Stewart's Rep. 320.

But in the case of *Le Grand v. Darnell*, 2 Peter's Rep. 664. the court held, in accordance with the decisions in Maryland, that a devise of property, real or personal, by a master to his slave, entitles the slave to freedom, by implication. And see *Hall v. Mullin*, 5 Har. & Johns. Rep. 190.

In some of the states the owners of slaves may manumit them by will. In Virginia and Kentucky a devise of freedom to a slave is effectual to give them freedom. But in other states the manumission of slaves is guarded by legislative enactments, making it necessary to have the assent of the state, as in Tennessee, South Carolina, Georgia, &c. See tit. Emancipation.

4.

LOGAN v. WITHERS. April T. 1830. 3 J. J. Marshall's Rep. 389. S. P. IRONS v. LUCKY, 1 Marshall's Rep. 74.

Held by the court, *Buckner J.*, that slaves devised are not assets in the hands of the executor, but the legal title is immediately transferred to the devise, and he may take possession of them without the assent of the executor, and he may recover them by suit without giving a refunding bond.

And the will transfers the title to the devisee.

5.

WALTON'S HEIRS v. WALTON'S EX'RS. Nov. T. 1831. 7 J. J. Marshall's Rep. 58.; M'DONALD v. M'MULLIN, 2 Rep. Const. Court S. Carolina, 97.

Held by the court, *Robertson, Ch. J.*, after refering to *Mason v. Mason's Ex'rs*, 3 Bibb's Rep. 448., that notwithstanding the act of 1800 has made slaves *real estate*, a general devise of slaves will pass all those which the testator has at his death, and the devise will be considered as speaking at the death of the testator.

And the will, will speak from the death of the testator.

6.

WALTON'S HEIRS v. WALTON'S EX'RS. Nov. T. 1831. 7 J. J. Marshall's Rep. 58.

The court, *Robertson, Ch. J.*, held, that since the act of 1800, which makes slaves *real estate*, a will that would not pass lands will not pass a slave; the effect of the act is, that a person under 21 years of age cannot devise a slave; that a will that would not pass land will not pass a slave; and that a devisee of a slave will take under the will, in the first instance, just as a devisee of land would take and hold land devised.

And a will that will not pass real estate, is ineffectual to pass slaves.

(C.) BY PAROL CONTRACT.

1.

STRAWBRIDGE v. WARFIELD. April T. 1832. 4 Louisiana Rep. 21.; ROBINEAU v. CORNIER, 1 N. S. 456.; HIGHLANDER v. FLUKE, 5 Martin's Rep. 442.; MADRY v. YOUNG, 3 Louisiana Rep. 160.

The parol sale of a slave is not void; the party sued may waive his right to exclude parol proof.

Per Cur. Porter, J. The judge of the court of the first instance, considered the verbal sale of the slave was null. But we differ with him on this point. On the provisions of the old code,

the jurisprudence of this court was settled, that parties had a right to admit a parol contract for the sale of immovable property ; and if they choose they might, as they did in this instance, admit parol evidence to prove it. The late amendments to the Louisiana code have not changed those of the civil code, except in recognizing the validity of a verbal sale, and in establishing, by their authority, the doctrine that the exclusion of parol testimony in relation to contracts of the description of that before us, is a privilege which the parties may waive.

2.

BANK'S ADM'R v. MARKSBERRY. Spring T. 1828. 3 LITTLE'S Rep. 275.

But the slave must be delivered, or the transfer must be by deed, and contain a consideration.*

Per Cur. It was urged, that the gift of the slaves was void, there having been no delivery of them to the donees. There is no doubt that, to the completion of a parol gift, the delivery of the thing is essential ; but we apprehend this principle does not apply to a gift by deed, if the deed be founded on a good consideration. The relation of father and child, which subsisted in this

* Voluntary gifts and grants are valid between the parties, and are held good when the interests of third persons are not affected. Possession should accompany the gift ; or, in other words, a change of possession should take place. It is a controverted question, whether the possession of the goods remaining in the vendor or donor is, or is not, conclusive evidence of fraud ; or whether it is only *prima facie* evidence of it, and therefore a proper subject for the jury to examine into and decide. The distinction probably, in a great measure, is determined by the nature of the conveyance, or transfer of the property. If the instrument of conveyance be absolute and unconditional on its face, it is held, the possession must pass to the vendee or donee, otherwise the transaction will be held fraudulent by the court. This principle was stated and acted upon by Ch. J. Marshall, in *Hamilton v. Russel*, 1 Cranch's Rep. 309. The chief justice observed, that modern decisions have determined, that an unconditional sale where the possession does not accompany and follow the deed, is, in respect to creditors, by the statute of Eliz., a fraud, and should be so determined by the court. And the principle is sustained by many cases in the courts of the several states. *Paton v. Smith*, 4 Conn. Rep. 455. ; *Talcott v. Wilcox*, 9 Conn. Rep. 134. ; *Young v. Pate*, 4 Yerger's Rep. 164. ; *Clow v. Woods*, 5 S. & R. 275. ; *Babb v. Clemson*, 10 S. & R. 419. But in the case of *Sydney v. Gee*, 4 Leigh's Virginia Rep. 525., which was a bill of sale absolute for certain slaves, and a delivery to the vendee, and a redelivery back to the vendor at hire for the price of their board—the court, Tucker, J., observed, that innumerable instances of delivery and re-delivery are unassailable. I buy a horse from a countryman, and the seller immediately borrows him to save himself the fatigue of travelling home on foot. I buy a slave in midsummer which I shall not want till Christmas, and hire him to the vendor for the residue of the year. I invest money in slaves, not to till my land, but to let to hire. I think these are cases of constructive fraud. It is strongly my impression, that the failure to deliver possession, where no real fraud is intended, does not attach fraud to the transaction forever ; and

case, is a consideration of this sort. Such a consideration, when coupled in a deed, was, at common law, held sufficient to create a trust in real estate, which would be decreed in a court of equity; and under the statute of uses is sufficient to transfer the use into possession, and thus complete the legal title in *cestui que use*; and much more ought such a consideration be deemed sufficient to support a deed alienating the personal estate.

3.

GAUNT v. BROCKMAN. Spring T. 1808. Hardin's Rep. 331;
TURNER v. TURNER, 1 Wash. Rep. 139.

It was held by the court, that after the passage of the act of Virginia, 1758, and before the operation of the act of 1785, a parol gift of slaves was void as between donor and donee, as well as against creditors. But now a parol gift of slaves is valid. See *Lucy v. Wilson*, 4 Munf. Rep. 313.; *Fitzhugh v. Anderson et al.*, 2 Hen. & Munf. 289.; *Moore's Adm'r. v. Dawney*, 3 Hen. & Munf. 127.; *Boutright v. Meggs*, 4 Munf. Rep. 145.; *Johnson v. Hendley*, 5 Munf. Rep. 219. In most of the states the statute of frauds has been considered as made to protect creditors and purchasers, and a parol contract for the sale of goods and chattels, and sales and gifts of slaves, have been held valid *as between the parties themselves*, and are only void when creditors are hindered or delayed, or the rights of third persons affected. See the cases *Abridged*, and *Goodwin v. Morgan*, 1 Stewart's Rep. 278.; 1 Hayw. Rep. 289.

A parol gift of slaves before the act of 1785 was absolutely void in Virginia.

that a subsequent delivery will make it valid against all subsequent creditors and purchasers. In New York it is the impression at the bar, that the English rule recognized in *Sturtevant v. Ballard*, 9 Johns. Rep. 337., that where possession does not accompany an unconditional sale of goods, it is evidence of fraud *per se*, is overruled by the cases of *Ludlow v. Hurd*, 19 Johns' Rep. 221., and *Bissel v. Hopkins*, 3 Cowen's Rep. 156. And the same principle was recognised in *Brooks v. Powers*, 15 Mass. Rep. 244. But admitting the rule to be as laid down in *Bissel v. Hopkins*, that the possession remaining in the vendor or donor is only *prima facie* evidence of fraud, still, if the party is unable to show that the possession is *bona fide*, and the transaction fair and honest, it becomes conclusive evidence of fraud, and the jury must find accordingly. In *Talcott v. Wilcox*, 7 Conn. Rep. 134. 140, *Bissel, J.*, observed, that it is undoubtedly, as has been contended, the settled law of this state, that if the vendor of personal property be permitted after the sale to retain the actual and visible possession, it is, unexplained, conclusive evidence of fraud.

4.

FARRELL v. PERRY, Oct. T. 1790. 1 Haywood's Rep. 2.

So in North
Carolina.

Per Cur. Williams, J. If a father at the time of his daughter's marriage puts a negro or other chattel in the possession of the son-in-law, it is in law a gift, unless the contrary can be proven. The same principle was settled in *Carter's Ex'r v. Rutland*, *ibid.* p. 97. And again, *Parker & Wife v. Philips*, p. 451.; *Pearson v. Fisher*, 1 Car. Law Rep. 460.; *M'Rce v. Houston*, 3 Murphy's Rep. 429.; *Lynch Ex'rs v. Ashe*, 1 Hawks' Rep. 338. By the act of 1806 it is stated in a note, *Farrel v. Perry*, by the editor, that no parol gift of slaves is good in any case in North Carolina, and that a written transfer is in all cases necessary, even between the parties. *Colten v. Powell*, 2 Car. Law Rep. 432.; *Barrow v. Pender*, 3 Murphy's Rep. 483.

5.

THE EXECUTOR OF LYNCH v. ASHE. June T. 1821. 1 HAWKS' North Carolina Rep. 338.; MADRY v. YOUNG, Louisiana Rep. vol. 3. p. 162.

Under the act of 1784, relative to the transfer of slaves, a transfer by parol is good as between the original parties and volunteers under them, and is void only where creditors and purchasers are concerned.

This was an action of detinue for certain slaves. The defendant pleaded *non detinet*, the act of limitation. It appeared on the trial, that the father of the plaintiff's testator died in March, 1781, and shortly after, the mother of the testator made a parol gift to him of the negro woman, for whom and whose increase the action was brought. The plaintiff's testator took the negro woman into his possession, but afterwards loaned her to his mother. In the year 1793, his mother intermarried with one Hargrove, an old servant in the family of Major Strudwick. The mother, during her widowhood, always stated the slave and her children to be the property of her son, plaintiff's testator, as did also Hargrove after his marriage; and at one period Hargrove sent them home to Lynch; but soon after they were sent back. In the year 1804, Hargrove and his wife separated; he removed to a tract of land which he obtained from Mrs. Strudwick, carrying the slaves in dispute with him. On the 10th of August, 1805, Hargrove gave Mrs. Strudwick a bill of sale for the slaves, and at the same time Strudwick conveyed to Hargrove an estate for life in a tract of land by deed, in which it was mentioned, that Hargrove was to retain possession of the slaves during his life. In October, 1805, Hargrove re-conveyed his interest in the land to Strudwick. It was proved that Strudwick

had paid some small debts for Hargrove, and expressed a wish to have the use of the slaves while Hargrove lived, saying, that at his death they should go to the rightful owner. In March, 1815, Hargrove died, and plaintiff's testator obtained possession of the slaves, and kept them about a month, when Strudwick again obtained possession of them. The defendant claimed as distributee under Strudwick. Lynch died, and his executor brought this action within three years next after Strudwick got the slaves out of the possession of Lynch.

The court instructed the jury, that (without deciding whether the purchaser intended to be protected by the act of 1784, was one from the donor, or might be from any person claiming under the donor,) it was at least necessary to show that Strudwick was a *bona fide* purchaser for a valuable consideration; that a colorable consideration would not destroy the plaintiff's title; that if they believed from the evidence, that Hargrove's possession was not an *adverse possession*, it availed the defendant nothing; and thus the act of 1806 did not merge, or destroy the plaintiff's title, although Hargrove or Strudwick had the negroes in adverse possession upwards of three years after that act went into operation; because Thomas Lynch, the plaintiff's testator, had regained the possession in 1815, and kept them in his undisturbed possession for one month, or thereabouts, at which time the title and possession were united in Lynch. And as this was in three years next before the commencement of the action, the act of limitation did not protect the defendant. The jury found a verdict for the plaintiff. A motion for a new trial was moved for, on the ground of misdirection as to the law. The motion was overruled, and from the judgment rendered defendant appealed.

Henderson, J. I am of opinion that the law was correctly laid down by the presiding judge, in his charge to the jury: for, however much we may now regret that the act of 1784 was not construed as a statute of frauds, avoiding all parol gifts of slaves, as well between the parties, as where creditors and purchasers were concerned, it is now too firmly settled, by a uniform train of decisions, to be even questioned, that as between the parties, and volunteers under them, the transfer is good, and that it is void only where creditors and purchasers are concerned; nor can we adopt the expedient pressed upon us from the bar, that we would in this case give to the act what we consider to be its true construction, as there has been no decision that a fraudulent or color-

able purchaser was not within the prohibition of the act. This would, to our understanding, be something like a subterfuge; the protection of the act is afforded to a purchaser on account of his merits, not his demerits. We cannot perceive the situation of a fraudulent and colorable purchaser to be better than that of the person from whom he purchased. Can title be strengthened by adding a fraudulent link to the chain? It appears to me, that if either is to be preferred, it is the original party; if Strudwick therefore was a fraudulent or colorable purchaser, (and this fact was properly left to the Jury,) he and his voluntary representatives stand in the situation of the husband, Hargrove, from whom he purchased; and as the parol gift, if made, was binding upon Hargrove, it is binding on the defendant Ashe, who is a volunteer under Strudwick. Judgment for the plaintiff.

6.

MARY CHOAT v. JOHN WRIGHT. June T. 1830. 2 Devereaux's North Carolina Rep. 289.; GOODWIN v. MORGAN,; 1 Stewart's Rep. 278.; 1 Haywood's Rep. 289.

A sale of a slave accompanied by a delivery is valid, and transfers the title, notwithstanding no bill of sale is executed, nor any memorandum of the contract signed by the parties thereto.

Trover for a slave. The defendant, under the general issue, gave in evidence that an execution against one *Isham Choat*, came to his hand, as sheriff, under which he seized the slave, and the only question was, whether the defendant in this execution had a title to the slave. On the evidence it appeared that the slave had been the property of one *Sybert Choat*, and was by the plaintiff, as his executrix, set up at public auction, and stricken off to *Isham Choat* at 600 dollars; that the slave was delivered to the vendee; but no bill of sale, nor any memorandum of the sale in writing, was executed by the plaintiff. His honor charged the jury, that the sale of a slave, accompanied with delivery of possession, passed the title, notwithstanding the act of 1819. Rev. ch. 1016. A verdict was returned for the defendant, and the plaintiff appealed.

Ruffin, J. We should lend a ready ear to any plausible argument, tending to prove that this case is within the statute of frauds; (Act of 1819. Rev. ch. 1016. ;) for we feel that all the mischiefs are as apt to arise out of executed, as executory contracts. But the words are too strong and plain to be got over. We think it extremely probable, that the draftsman considered, when he put lands and slaves on the same footing, that he required all contracts respecting each to be in writing. If he did, it was a great mistake. However the words of the act may be construed, if applied to

slaves alone, they cannot embrace executed contracts, when applied to both. The act says, that "all contracts to sell or convey lands or slaves shall be void and of no effect, unless such contract, or some memorandum, or note thereof, be put in writing, and signed by the party charged, except contracts for leases not exceeding three years." The question is, what sort of contracts is here meant? Certainly, only such a contract respecting slaves is within the act as would also be within it if it respected land; for the two subjects are placed side by side. It is perfectly clear, that executory contracts alone can be meant when land is the subject. For before that time, a conveyance of freehold land could be by *deed* only, and it is absurd to talk about "a note or memorandum in writing," as a thing that can *pass* such lands. In relation, therefore, to realty, not only the words of the act, "a contract to *sell*," but the state of the law before, restrains the statute to executory contracts. This ties us down, against our wills, to the same construction as regards slaves. Therefore, a *sale* of slaves by parol, that would have been good before the statute is still good. We are aware of the great inconveniences that will arise from this construction; and that has made us very reluctant to adopt it. For the same fraud and perjury will be practised in the dispute, whether the contract was one "to sell," or "of sale," as in ascertaining the particular terms of a contract to sell, and thus all the benefits intended by the legislature be defeated. But the framing of the act compels us to pronounce the judgment we do. Judgment affirmed.

7.

MORROW et al. v. WILLIAMS. Dec. T. 1831. 3 Devereaux's North Carolina Rep. 263.

Detinue for a slave. A verdict was taken for the plaintiff, subject to the opinion of the court, upon the following case:

Jemima Bradshaw, on the 30th of December, 1820, signed an instrument, of which the following is a copy: "To all people to whom these presents shall come, I, *Jemima Bradshaw*, for and in consideration of the natural love and affection which I have and bear to my beloved son-in-law Arthur Morrow, and my daughter Jemima Morrow, and for divers other good considerations me hereunto moving, have given and granted, and by these presents do give and grant, unto the said Arthur and Jemima Morrow, my negro boy Abraham, &c., (mentioning several articles of personal property,) to their use, and to use singularly to them, and the chil-

A gift of slaves, made by an instrument not under seal, and unaccompanied by delivery, is void.

dren of *Jemima* Morrow, that she may have by her said husband, to enjoy full power and possession of, after my death, to have and to hold, and enjoy all and singularly the said negro boy *Abraham*, &c., unto the said *Arthur* and *Jemima*, and their children. In witness whereof, &c.

“JEMIMA BRADSHAW.

“Signed in presence of.”

The plaintiff was the wife of Morrow, and the children born at the date of the paper above set forth.

Per Cur. Hall, J. Several valid objections occur to the claim of the plaintiffs. The first is, that the gift is not established by a deed, or, in its absence, by evidence of a delivery: the writing introduced and relied upon, not being under seal, is nothing more than the declaration of *Jemima Bradshaw*, that she gave the negro to her daughter and son-in-law, but there having been no delivery, no title vested in them; and there being no valuable consideration, no right of property passed from her. Judgment for the defendant.

8.

WILLIAMS et. al. v. HORTON. May T. 1826. 16 Martin's Louisiana Rep. 464. 467.

A donation
of slaves
without es-
timation is
void.

This suit was commenced for the purpose of rescinding a deed of gift of slaves, on account of legal informality in its execution. The plaintiff obtained a verdict and judgment thereon, declaring that the donation was void, and the defendant appealed.

Per Cur. Mathews, J. The reasons why our legislature, in conformity with the legislation of France, should have embarrassed donations with so many forms, are not very palpable and evident to the minds of men who are only conversant with ordinary affairs of human life; in truth, they cannot be considered as very conspicuous and imposing on those learned in the law. Why honest generosity should be thus trammelled, is not easy to account for: *sed ita lex*. In resorting to Toullier's Commentary on the Code Napoleon, it is discovered that tradition, *i. e.* delivery *de manu in manum*, of moveables, according to the decisions of the courts of justice in France, dispenses with many, if not all the forms prescribed by the Code for the perfection of donations. See 5 Toullier, p. 181—184. Want of estimation of the property given is cured by delivery of moveables. The 48th article of our late civil Code is, verbatim, that of the 948th article of the French

Code, except that ours provides expressly in the same manner for the donation of slaves, and requires that an estimate should be made of them, and signed by both donor and donee, &c. There can be no doubt, according to the interpretation given to this law by French jurists, and which we believe to be correct, of tradition of moveables obviating the invalidity of a donation, which would otherwise take place for want of an estimate. The only question which remains for examination is, whether the delivery of slaves, under a deed of grant, made and accepted in due form, will, agreeably to general rules of property in this state, produce the same effect? The principle reason which seems to have influenced the opinions and decisions of those who have considered tradition of moveable property, made in pursuance of a will to give, as sufficient to cure all defects of form in donations, is, that possession of this kind of property is held to be equivalent to title, or in other words, to be evidence of title. But according to our laws in relation to titles by which property is held, a written instrument is required in order to transfer slaves from one proprietor to another; and when the evidence offered in support of title to them is an act of donation, to give it validity, it must appear clothed with all the formalities required by law, and sanctioned by an authentic deed. Mere possession is not evidence of title. In the present case, the notarial act is invalid, for want of the estimate required by the code, and is therefore no evidence of title in the donee, because donations cannot be supported by any instrument inferior to authentic acts. In this species of contract forms appear to assume the place of substance. From the foregoing review of the case, there can be no difficulty in perceiving the difference in the legal principles which govern it, from those on which the decisions were made, relative to synallagmatic contracts, relied on by the counsel for the appellants. Judgment affirmed.

9.

ATKINSON v. CLARKE. Dec. T. 1831. 3 Devereaux's North Carolina Rep. 171.

Ruffin, J., delivering the opinion of the court in this case, decided, that an assignment of slaves not under seal is void, where there is no delivery of possession, or price paid. In Kentucky, no parol gift of a slave could be made prior to the act of 1787. By that act a parol gift was valid if accompanied by possession. But even under that act the possession of the donee, is not valid

Rule as to the transfer of slaves in North Carolina.

against the creditors of the donor, or purchasers for a valuable consideration, until the donor shall have been in possession three years.

10.

BUTT v. CALDWELL. Fall T. 4 Bibb's Rep. 459.

When hired out.

Held by the court, that the sale of a negro while she was hired to another, transfers the possession, as well as right of property ; and the bill of sale is not, as to creditors, fraudulent *per se*, because possession was not actually given to the purchaser at the time. The slave at the time of the sale was hired out, but the owner might nevertheless sell him. The right to dispose of property, though not in the possession of the vendor, but which was held under him, was decided in *Bullock v. M'Calla*, 2 Bibb's Rep. 289. If, then, the right may be thus transferred in the slave, the subsequent holding by the person who had hired, ought not to be treated as the possession of the seller.

11.

BARFIELD v. HEWLET. June T. 1832. 4 Louisiana Rep. 118.

Sale by an auctioneer of a slave without authority vests no title.

Held by the court, *Martin, J.*, that the purchaser of a slave at auction acquires no title, if his vendor be without authority to sell.

12.

WILLIAMS v. MOORE. Oct. T. 1811. 3 Munf. Rep. 310.

Where a slave was sold on condition, that if the buyer did not like him, to return him in a specified time, and in the mean time the slave is frost bitten, the buyer may return the slave, and is not liable if he took such care as a man of prudence takes of his own.

The declaration averred, that the defendant entered into a verbal agreement with the plaintiff to purchase a negro woman slave, named Peg, for \$300, upon condition, that if the defendant did not like her, he was to return her in two or three weeks ; and in pursuance of the said agreement, the defendant received the said Peg, and while in his possession, she was injured by being frost bitten, and rendered of little value ; and thereupon the defendant refused to keep the said negro, or to compensate the plaintiff.

The counsel for the plaintiff moved the court to instruct the jury, "that if they were of opinion that the negro mentioned in the declaration was purchased by the defendant of the plaintiff, upon that condition ; that if after keeping her two or three weeks, he did not like her, he was at liberty to return her ; that in such event, the defendant, to entitle him to the benefit of the contract, was bound to return her in the same condition he received her,

even although the injury she sustained was not imputable to the neglect of the defendant." But the court refused to give the jury such instruction, and instructed them, "that no bailee is responsible for accident, unless it be expressly agreed between the parties to the contract, that he shall be so liable; that when the bailee alone is benefited by his contract, he is bound to slight neglect; and that slight neglect is the omission of that diligence which very circumspect and thoughtful persons use in securing their own goods and chattels." To which opinion of the court, "refusing the instructions," the plaintiff filed a bill of exceptions. Verdict and judgment for the defendant. Plaintiff appealed.

At a subsequent day the president pronounced the court's opinion, that the judgment be reversed, the verdict set aside, and the cause remanded to the superior court of law, with discretion of that court to instruct the jury, that, "if the injury to the slave complained of was not imputable to the neglect of the appellee, he would not be responsible therefor, unless he expressly agreed to be so liable, and that as no such agreement is charged to have been made, he is only bound, according to the present declaration, for ordinary care of the slave in question; that is, such care as any man of common prudence, and capable of governing a family, takes of his own concerns, and that he is answerable for ordinary neglect only."

13.

HARPER V. DESTREHAN. April T. 1824. 14 Martin's Louisiana Rep. 389.

Per Cur. Porter, J. The plaintiff sued to recover a female slave, who had been illegally and forcibly taken out of his possession. The judge below decreed he should recover, but condemned him to pay the price of the negro, because she had been stolen, and purchased by the defendant at public auction. Both parties appealed from this judgment. The evidence proves the identity of the slave, that she was part of the estate of one William Burland, deceased; and came into the possession of the plaintiff as guardian to William Burland, jun. The title under which defendant claims is of a date previous to this, and nothing shows any right in the person from whom it emanated. The plaintiff, therefore, is entitled to recover, and the only question which remains to examine, is, whether he must reimburse the defendant the price he has paid for her. His obligation to do so has been contended in this court to

The bona fide vendee of a stolen negro is not entitled to demand the price from the lawful owner.

result from the provision in the code, which declares, *that things moveable* may be prescribed for in three years, unless they have been stolen; and even if they have been stolen, the owner cannot recover them without paying the possessor the price which they cost him, provided he bought them at a public market, fair, or at a public auction. Civil Code, 488., art. 74, 75. Slaves, by the laws of this country, are considered as immoveable, not moveable; therefore, the above rule does not apply to them. The reason upon which that rule was established, also excludes the idea of its having any application to this kind of property. It does not pass by delivery, but by writing, and the purchaser should look to title, and not to possession, as evidence of ownership. It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed; and it is further ordered, adjudged, and decreed, that the plaintiff recover of the defendant the slave claimed in the petition, with costs in both courts.

14.

DUPREE v. HARRINGTON. NOV. T. 1824. 1 Harper's Rep. 391.

Where a vendor of personal property conveys to the vendee upon condition of payment at a specified time, with a stipulation that the right of property is to remain in the vendor till payment; a sale of the property by the vendee, without performing the stipulation, conveys no title.

Trover for a horse. Where the plaintiff agreed to sell, and actually delivered a horse, with a stipulation in the written contract that the right of property should remain in him, and not pass to the vendee until half the consideration should be paid, the court held, that until the payment according to the contract, the right of property in the horse remained in the plaintiff.

Per. Cur. Gantt, J. The possession of a chattel is in law *prima facie* evidence that it is accompanied with the right to property; but the presumption may be rebutted by higher and better evidence. I hold it to be a correct and well established principle, that the owner of a chattel may make a qualified contract respecting it, and in parting with the possession, still retain his right of property. It is the case in bailments, where the possessor has only a qualified right, the absolute right being in the bailor. So, a sale may be absolute or qualified, and the seller may secure himself by taking a mortgage of the thing sold, and the lien will attach on the mortgaged goods into whose hands soever they may come. The vendee has no right of property in the horse until payment; his sale, therefore, to Harrington, the defendant, with notice of the non payment, passed no title, and the plaintiff must recover.

(D.) BY GIFT TO CHILDREN IN CONSIDERATION OF MARRIAGE ;
and see tit. "POSSESSION."

1.

MOORE'S ADM'R V. DAWNEY et al. Oct. 1808. 3 Hen. & Munf. 127.

The plaintiff's intestate, intermarried with the daughter of Zachariah Burnly, Dec. 1795, who was a man of large fortune ; and immediately after the marriage, Burnly sent the slaves in the declaration mentioned to his son-in-law, in whose possession they remained until his death, in April, 1795 ; and afterwards they were seized upon execution, as the property of Zachariah Burnly.

When they will be held as gift in consideration of marriage.

The court held, that where a father, possessed of a large fortune, sent his slaves immediately after marriage of one of his daughters to her husband, where they remained until the husband's death, which happened two years and four months after, they would presume the slaves were a gift in consideration of marriage.

Per Tucker, J. It appears to me that the delivery of the negroes to the husband immediately after the marriage, may well be presumed to have been in consideration of marriage.

2.

TAYLOR V. EUBANKS. Spring T. 1821. 3 Marshall's Rep. 239.

Detinue for a slave. It appeared that George G. Taylor, on the marriage of his son, the appellant, made a parol gift of the slave in question to him, and in about one year the slave was taken out of his possession upon an execution issued against the father, who was indebted to the execution creditor in a considerable sum at the time of the gift. The court instructed the jury, that if they believed, from the evidence, that the father was indebted at the time of the parol gift of the slave to the son, the gift as to the execution creditor was void in law. Verdict for defendant ; and Taylor appealed.

The mere circumstance of a parent being indebted at the time he makes an advancement to his child, does not, of itself, render the gift void ; it is the intent to defraud, that vitiates the gift.

Per Cur. Owsley, J. If by the instruction given it was intended by the court to decide, that under the statute against fraudulent conveyances generally, the mere circumstance of a father being indebted at the time of making the conveyance, does, within itself, as matter of law, render a gift made to the son, in consideration of natural love and affection, void as to creditors, we entertain no doubt the instruction cannot be sustained. The statute of this

country, which was taken from, and contains, in substance, the provisions of the 13 and 27 Elisabeth, no doubt makes void all conveyances made with an intention to hinder, delay, or defraud creditors; but it is the fraudulent *intent* with which the conveyance is made, and not the circumstance of the alienor being at the time *indebted*, that makes the conveyance void.

From his being indebted, an intent to defraud may be presumed; but it is a presumption which may be repelled by other evidence, and which should be made by the jury, and not the court. There may be cases where, from particular facts, it would be proper for the court to infer a fraudulent intent; but those are cases where, from the facts, the law itself implies the intent, and allows the introduction of no evidence to repel the implication. But the circumstance of being indebted is not such a fact from which the law implies an intention in the person conveying, in consideration of natural love and affection to defraud his creditors.

3.

TAYLOR, EX'R OF ROWLEY, v. WALLACE AND WIFE. NOV. T. 1786. 4 Call's Rep. 92.

When within the statute.

The question was, whether a verbal gift of slaves to an unmarried woman, to whose husband the slaves upon his marriage were delivered, and in whose possession the same remained until his death, four years afterwards, be within the statute for preventing fraudulent gifts of slaves.

The court of appeals certified their opinion to be, that the said gift was void, and within the statutes for preventing fraudulent gifts of slaves.

4.

BYRD v. WARD. June T. 1827. 4 M'Cord's Rep. 228.

Sending a slave home with a married daughter, and permitting her to remain there four years, is a gift of the slave to the husband.

Trover for a slave. Allen married the daughter of Mr. Byrd, and when about moving her to his own house, Mrs. Byrd told two negro women to go home with Mrs. Allen, and assist her; one of the negro women returned soon after, and the other remained four years in Allen's family, and was considered by the neighborhood as the property of Allen. Allen becoming embarrassed, Mr. Byrd executed a deed of trust to the plaintiff of the negroes, for the use of his daughter, Mrs. Allen. The negroes were sold by an execution creditor of Allen. Verdict for plaintiff, and motion for a new trial.

Per Cur. Nott, J. Permitting negroes to go home with a daughter, on her marriage, has always been considered as *prima facie* evidence of an unconditional gift; and the only question now for our consideration is, whether this case is an exception to the general rule. One of the slaves remained four years in Allen's family. Such a length of possession would give a statutory right, and would be conclusive evidence of the intention of the parent. And after that period the father of Mrs. Allen could not, by a voluntary settlement, defeat the rights of creditors. The inference from the facts is, that the property must be considered as belonging to Allen, and subject to the payment of his debts. I am of opinion, that the verdict in this case is contrary both to law and evidence, and that a new trial ought to be granted.

5.

CLYNG v. LOCKART. June T. 1827. 4 McCord's Rep. 251.

Trover for a slave. The plaintiff proved the defendant sent his slave to plaintiff's house about a year after he had married the defendant's daughter, where the slave remained until the death of the daughter, when the defendant took the slave away.

And it is immaterial whether the slave goes with the daughter, or is afterwards sent.

The court charged the jury that the rule of law was, that where a parent suffered property to go with a child upon marriage, a gift was implied; but it did not extend to this case. Here the property went into the possession of the son-in-law a year *after* marriage. Verdict for defendant, and the plaintiff appealed. The court, Colcock, J., held, that the charge of the court was wrong, and a new trial must be granted.

6.

MAHAN v. JAMES. Spring T. 1810. 2 Bibb's Rep. 32.

Held by the court, Clark, J., that a gift of a slave, accompanied by possession, is valid, and cannot be invalidated by a subsequent devise of the donor. A gift of a slave, accompanied with actual possession, vests in the donee an absolute property, unless it be done with an intention to defraud.

A valid gift is irrevocable.

(E.) BY THE STATUTE OF LIMITATIONS.*

1.

HARDESON v. HAYS. March T. 1833. 4 Yerger's Rep. 507.

Although, by the statute of North Carolina, a gift of slaves must be by deed, or writing, or the same is absolutely void; yet, where the gift was by parol, and the donee had possession, claiming the property as his own by virtue of the gift more than three years, it was held, that the title was thereby vested in him by the act of limitations, and consequently vested in a purchaser from him.

This was an action of detinue, brought by Samuel Hays against the plaintiff in error, Hardeson, to recover two slaves, Rachel and her child, which Hays claimed as his property. It appeared from the evidence, that the plaintiff below was the original owner of the slaves; that William Hays, under whom the defendant below, Hardeson, claimed, married the daughter of the plaintiff, Samuel Hays, in North Carolina, in 1811; that between that year and 1818, several slaves had been sent by Samuel Hays to William Hays, which were returned; that in January, 1818, the girl Rachel was sent in exchange for one previously sent; that from 1818, until William Hays moved to Tennessee, in 1826, Rachel remained in his possession, except a few weeks, now and then, when she was at Samuel Hays'; that William Hays claimed her as his own, and exercised acts of ownership over her; that when he removed to Tennessee he carried Rachel with him; that she continued in his possession until he sold her to Hardeson, which was nearly five years; but Hardeson did not have her in possession three years before this suit was brought against him. Hardeson gave William Hays three hundred and thirty dollars for Rachel, her child not then being born. The laws of North Carolina, which were read in evidence, required that the gift should be in writing, or it was absolutely void to all intents. The jury, under the charge of the court, returned a verdict for the plaintiff. Such parts of the charge as the court deemed material or necessary to notice, are contained in the opinion delivered by Judge Green.

* The statutes of limitations, in reference to this species of property, are various in the different states where such property exists. In some of the states the limitation is three years, in others it is five. But in all of them the general principles applicable to the possession of chattels, prevail. An adverse possession under the statute for the time limited, gives the possessor a valid title, which he may avail himself of, in an action against him to recover the possession by a plea; or, if dispossessed, may recover the slave on the strength of the title gained by force of the statute. And where the possession is not adverse, and consequently the statute does not apply, a possession of twenty years as loanee or mortgagee will give a title. The court will consider the absolute right to the property is in the possessor, by force of the length of possession.

Per Cur. Green, J. The Court in this case charged the jury, in substance, that if the slave, for the recovery of whom this suit was brought, was given to William Hays, of whom defendant purchased her, in North Carolina, by the plaintiff, yet the gift not being by deed, proved and registered as required by the laws of that state, it would not pass the title, and that the possession of William Hays would be the possession of the plaintiff; so that the statute of limitations could not operate against the plaintiff; and that if William Hays brought the negro to Tennessee, and had her in possession in Tennessee more than five years, and then sold her to the defendant, that neither the statute of frauds nor the statute of limitations could operate to confer a title, or bar the plaintiff's recovery, unless the defendant had the negro in possession more than three years after his purchase from William Hays. In this charge the circuit court clearly mistook the law. Although the act of North Carolina of 1806, ch. 701. sec. 1., requires that a gift of slaves should be by deed proved and registered, yet, when the parol gift of the slave was made, William Hays held for himself, and not for the plaintiff, who had made the gift. No trust was created between the parties, as would have been the case had the slave been loaned; but the possession was, in law and in fact, exclusively for himself, and adverse to all the world. Having thus an adverse possession in North Carolina and Tennessee, for ten years, the plaintiff is barred by the statute of limitations. In *Kegler v. Mills*, 2 Martin & Yerger's Rep. 426., this court decided, that an adverse possession, so long as to bar the plaintiff's action against the possession, vested in him an absolute right to the property. The length of his possession, it being adverse, vested in William Hays an absolute right to the property, which was transferred by his deed to the defendant. The court therefore erred in telling the jury that William Hays had not such an adverse possession, in favor of which the statute of limitations could operate; and also, in telling them the defendant could not rely upon the previous possession of William Hays, and that to be protected, he must appear to have been three years in possession of the slave himself. Judgment reversed.

PARTEE V. BADGET et al. March T. 1833. 4 Yerger's Tenn. Rep. 174.

Three years' adverse possession of a slave vests the right of property in the possessor.

In this case the ancestor of defendants in error was originally the owner of the slaves in controversy. The plaintiff claimed them by gift from his father, and held adverse possession of them from the year 1821 until the year 1827, when the defendants in error retook them into their possession. This suit was then brought against them, and the jury, under the charge of the court, found a verdict in favor of the defendants in error. Upon which judgment was rendered. The court was requested to charge the jury, that if the slaves in question were more than three years in the adverse possession of the plaintiff, the defendants were barred by the act of limitations, and could not recover them by law; and having regained the possession, could not hold them against the plaintiff. The court refused so to charge; but stated to the jury, that the act of limitations only barred the remedy, and not the right, and though the defendant could not recover by suit, yet, if their title was good before it was barred, they had a right of reception at any time afterwards; and having got the slaves in their possession after their action was barred, they thereby resorted to their first right, and the plaintiff in such case could not be aided by the statute.

Per Cur. Peck, J. The question presented by this record arises upon the charge of the court. The circuit was of opinion, that the plaintiff could acquire no right of property in the slaves by virtue of an adverse possession, sufficient in point of time to form a bar under the act of limitations; that the remedy of the party who had the title was only barred, and not his right of property, and consequently the right of reception existed. In personal actions to enforce executory contracts, the statute of limitation only operates a bar upon the remedy; hence a distinct and unequivocal acknowledgment will revive the debt. But in relation to the title to personal property, the rule is, and from necessity must be, different. In such case, the uninterrupted adverse enjoyment for the period prescribed by the statutes vests the right of property in the possessor, unless prevented by some of the exceptions in the statute. Without detailing the dangerous consequences to society, the violence, the prostration of all good order, which would result from the adoption of a contrary doctrine, it is sufficient for us to say, that the question has been settled in this state, in the case of

Rigler v. Miles, Martin & Yerger's Rep. The decision in that case is amply sustained by the authorities referred to. We are of opinion that the circuit court erred in its charge to the jury upon this point, for which error the judgment must be reversed, and the cause remanded.

3.

SHELBY et al. v. GREY. Feb. T. 1826. 11 Wheat. Rep. 361.; S. P. BRENT v. CHAPMAN, 5 Cranch's Rep. 358.; AULD v. NORWOOD, 5 Cranch's Rep. 361.; GARTH'S EX'RS v. BARKSDALE, 5 Munf. Rep. 101.; CARTER et al. v. CARTER et al., 5 Munf. Rep. 108.

Detinue for slaves. Plea non detinet. Judgment for plaintiff.

Per Cur. Johnson, J. In the case of Newby v. Blakely, 3 Hen. & Munf. 57., a case strikingly resembling this in its circumstances, it was adjudged that a plaintiff, in Virginia, may recover in detinue, upon five years peaceable possession of a slave acquired without force or fraud. And four months after that decision, and obviously without being apprised of it, this court, in the case of Brent v. Chapman, 5 Cranch's Rep. 358., maintained the same doctrine; and such a possession constitutes a good title in Tennessee.

Five years' possession of slaves constitutes a title in Virginia, upon which the possessor may recover in detinue.

4.

SMART v. BAUGH. Spring T. 1830. 3 J. J. Marshall's Rep. 363.

Smart sued Baugh, in detinue, for a slave named Catharine. Smart claimed the slave in right of his wife, a daughter of William and Eleanor Johnson, by a parol gift by her grandfather, Peter Dopp, to her, of a female slave named Nancy, the mother of Catharine, in the year 1790. Baugh claimed under the will of Mrs. Johnson, her grandmother, and the mother of Smart's wife. The slave Nancy went into the possession of Johnson and wife. William Johnson died in 1819, and Mrs. Johnson, his wife, died in 1826. Johnson devised property to Smart's wife and other relatives, and Mrs. Johnson devised property to them also, and Catharine, a child of Nancy, to the defendant, her grand daughter, and the devisees took under each of the wills.

And the same principle has been adopted in Kentucky.

The court charged the jury, that the plaintiff could not claim under, and also against the wills; and that if he had accepted, and held property under one or both of them, and to which he had no

other valid right than that he so derived, they should find for the defendant.

2d. That if those from whom the defendant derived her claim had been in possession of Catharine more than five years before the institution of this suit, holding her adversely to the claim of the plaintiff, his right was barred, and he could not recover.

Per Cur. Robinson, Ch. J. As a general rule of law, it is well settled, that a person who claims the property under a will, cannot recover on a claim adverse to the will, other property which it devised to another person. Therefore, if A. devises to B. property which belongs to C., and also devises other property to C., C. must elect to yield his right to property devised to B., or he cannot hold that which is devised to himself. *Groves v. Kenon and Wife*, 6 Monroe's Rep. 635.

As to the second point in the charge, five years' uninterrupted adverse possession of a slave, not only bars the remedy of the real owner, but vests an absolute legal right in the possessor; and proof of such possession may show that the claimant has no right to the slave, and cannot recover. And five years adverse possession of a slave may vest such a title as will enable the possessor to maintain action for the slave; the same right, so acquired, may be proved by him under the general issue, in a suit brought against him for the slave, by the person against whom he had held adversely. Judgment affirmed.

5.

GARTH'S EX'RS v. BARKSDALE. 5 Munf. Rep. 101.

Even where the slaves are loaned.

Held by the court, that five years' peaceable and uninterrupted possession of slaves, under a loan, not evidenced by deed duly recorded, vests a title in the loanee, which enures in favor of his creditors, and cannot be divested, as to them, by returning the same to the lender, after the five years have elapsed. And in *Gay v. Mosely*, 2 Munf. Rep. 543., the court held, that a slave lent either before or after the act to prevent frauds and perjuries, and having remained, since the commencement of that act, more than five years in the loanee's possession, without any demand having been made on the part of the lender, must be considered the absolute property of the person so remaining in possession, as to creditors of, and purchasers under him.

6.

FITZHUGH v. ANDERSON et al., 2 Hen. & Munf. 289. 308.;
BOATRIGHT v. MEGGS, 4 Munf. Rep. 145.

Held by the court, that where the father, anterior to the statute of frauds, delivered certain slaves to his son, which were proved by verbal evidence, without any deed in writing, to have been lent for an indefinite period; and the son having obtained the uninterrupted possession for many years, used the property as his own, and acquired credit on the strength of the possession, in a controversy between the father, or volunteer claimants under him, and creditors of, or fair purchasers from the son, the father shall be deemed to have given him the slaves; and on general principles of law and equity, independently of any statutory provision, the title of such creditors and purchasers will be protected. The circumstance that the father afterwards, by his last will and testament, bequeathed the slaves to his son for life, remainder to his children, makes no difference in the case. See the case of Fitzhugh's Adm'r, v. Beale, 4 Munf. Rep. 186.

And the rights of the creditors of the loanee will be protected.

7.

NEWBY'S ADM'R v. BLAKEY, Oct. T. 1808. 3 Hen. & Munf. 57.;
BRENT v. CHAPMAN, 5 Cranch's Rep. 358.; TRAVIS v. CLAIBORNE. 5 Munf. Rep. 435.

The court. Tucker, Roane, and Fleming, Js., held, that where a plaintiff in detinue, who, after having had five years peaceable possession of a slave, acquired without force or fraud, loses that possession, may regain it on the mere ground of his previous possession; on the same principle that a defendant may protect himself on that length of possession under the act of limitation. Duval v. Bibb, 3 Call's Rep. 362.

Five years' peaceable possession gives a title to a slave, and which, if lost, may be regained.

8.

COOK v. WILSON'S ADM'RS. Fall T. 1821. 6 Little's Rep. 437.
S. P. STANLEY v. EARL, 5 Little's Rep. 281. THOMPSON v. CALDWELL, 3 Little's Rep. 136.

Per Cur. It has been held by high authority, that the adverse possession of a slave for five years would, under the statute of limitations, not only be a bar to an action of the former owner to recover the slave, but that it would give the possessor a title upon which he may maintain an action against the former owner,

Even against the former owner.

3 Hen. & Munf. 37. ; 5 Cranch's Rep. 358. ; and the same doctrine has been recognised in *Thompson v. Caldwell*, 3 Little's Rep. 136. And it appears by the case of *Stanley v. Earl*, 5 Little's Rep. 281., that the statute of Kentucky runs in the case of a person out of the state in possession of slaves.

9.

MIDDLETON v. CARROL. June T. 1830. 4 J. J. Marshall's Rep. 143.

And the same principle applies to a conditional sale.

Held by the court, *Buckner, J.*, that five years adverse possession of slaves by the vendee, and those claiming under him, under an unrecorded conditional sale to vendee, bars recovery of them by vendor ; nor will notice to purchaser from vendee of the condition in such unrecorded conditional sale, enable vendor to recover the slave from such purchaser. See the case of *Withers v. Smith*, 4 Bibb's Rep. 172. ; *Craig v. Payne*, *ibid.* p. 337. ; *Ferguson v. White*, 1 Marshall's Rep. 6.

10.

COOK v. WILSON'S ADM'R. Fall T. 1821. 6 Little's Rep. 437. ;

CHAPMAN v. ARMISTEAD, 4 Munf. Rep. 382.

Where a man held peaceable possession of a slave for more than 20 years, after which he lost the possession, and it was obtained by one who claimed title, the court held that the possession of the plaintiff was conclusive evidence of property.

Detinue for a slave. Verdict for defendant, and motion for a new trial.

Per Cur. It appears by the bill of exceptions, that the defendants attempted to maintain the title of their intestate by proving, that during the revolutionary war, he was an officer in the ten months' service in South Carolina ; that an officer in that service was entitled to two confiscated slaves ; that the mother of *Juda*, the slave in controversy, was allotted to him as one of those to which he was entitled ; and there being no express proof that any other was allotted to him, it was inferred that *Juda*, who was then a suckling child, was given to him as the other to which he was entitled. On the other hand, it was positively proved that *Juda*, about the close of the revolutionary war, was given to the wife of the plaintiff, as a compensation for her trouble in taking care of the other confiscated slaves, and that she then obtained possession of her, claiming her as her own, and continued to hold her until she intermarried with the plaintiff, who has held her as his property ever since, until within less than five years before the commencement of this suit, when the defendant obtained possession of *Juda*, and her children, born while in the possession of the

plaintiff. We think these facts do not warrant the verdict of the jury. The possessory title of the plaintiff is conclusive. Supposing the defendant's intestate to have had a good title to Juda, his failure to assert that title for a period of between 20 and 30 years, during all of which time the plaintiff and his wife held possession of Juda, claiming her as their own, must excite an irresistible presumption, that he had parted with his title, and that the right of property was in the possession. The same principle was decided by Judge Cranch, in *Mitchell v. Wilson*, May T. 1827. Circuit Court U. S., Washington, D. C. (MS.)

11.

MUNSEL, ADM'R OF SNEED, v. BARTLETT. April T. 1831.
6 J. J. Marshall's Rep. 20.

Thomas Sneed died intestate, and administration was granted to Sarah Sneed, his widow, and to Achilles Sneed, her brother, in 1803. In 1805 Achilles Sneed purchased from the heirs and distributees their interest in the negroes belonging to the estate of the intestate, by writing. The widow and administratrix still retained possession of the slaves, and in 1808 married Bartlett, and died in 1825. Achilles Sneed died a few months after, and Munsell administered on his estate, and brought this action against Bartlett, who kept possession of the slaves after the death of his wife. A verdict of nonsuit was entered, and Munsell appealed.

Twenty years' possession by a distributee will not of itself be sufficient to infer an assent by the administrator.

Per Cur. *Buckner, J.* The nonsuit was entered on the ground that the administratrix had not consented that Achilles Sneed should take the slaves.

It has been contended in argument, that the assent of the administrator must be presumed after the lapse of 20 years from the time that letters of administration were granted; that a jury may at all events rationally draw such an inference from the lapse of such time only, because it would bar all personal actions, and by its own force pay all debts. This position has not been supported by the citation of any authority; nor can the argument be sustained on principles of reason, however plausible it may be. The lapse of 20 years from the grant of administration is not sufficient of itself to raise a presumption that the administrator *has consented* that the distributees may take the slaves which belong to the intestate's estate; nor can a jury, from the lapse of 20 years from the grant of administration, rationally infer that the administrator has consented

that the distributees should take the slaves which belong to the estate of the intestate. Ch. J. *Robertson* dissented. Judgment affirmed.

12.

ORR et al. v. PICKETT et al. January T. 1830. 3 J. J. Marshall's Rep. 268.

Five years' possession of a slave gives title.

Per Cur. Underwood, J. Under the statute of limitations five years' continued adverse possession vests in the holder a complete title to a slave against all the world; those laboring under some disability provided for in the statute, excepted.

13.

ORR et al. v. PICKETT et al. January T. 1830. 3 J. J. Marshall's Rep. 268.

But the statute does not apply where the possession is not adverse.

Per Cur. Underwood, J. So long as Orr held possession of the slaves according to Pickett's title, the possession would be adverse to Pickett; and if the slaves were not delivered to him on demand, he might maintain detinue, or any appropriate action, and recover, although Orr's possession may have continued more than five years. The possession must be adverse, or the statute is no protection. *Mims v. Mims*, *ibid.* 106.

14.

MIMS v. MIMS. Fall T. 1829. 3 J. J. Marshall's Rep. 103.

Per Cur. Underwood, J. Possession must be adverse, or the statute is no protection to the possessor; as where he holds slaves as pawnee, or pledgee, or bailee. In such cases there is no limitation, but chancery may presume that the equity of redemption has been relinquished.

15.

ELMORE v. MILLS. Sept. T. 1796. Haywood's Rep. 360.;
BERRY v. PULLIAM, *ibid.* 16.

When the statute begins to run.

Per Cur. The act of limitations began to run from the time the negroes came into the possession of the defendant, unless he was entrusted with them by the plaintiff for an indefinite period of time; for then the act will not begin to run till demand made, or unless the plaintiff can show that the defendant re-

moved himself to such places where the plaintiff could not find him to institute his suit, or that the defendant had the negroes without the knowledge of the plaintiff.

16.

DAVIS V. MITCHELL. Dec. T. 1833. 5 Yerger's Tenn. Rep. 281.

This suit was brought to recover a slave. The plaintiff proved that the slave had been given to him whilst an infant; that at the time of making the gift, possession of the slave was given to his guardian, and that he had remained with his guardian for three years, and more, before he came to the possession of the defendant.

The court charged the jury, that possession of a slave for three years by an infant claiming the slave as his own, would communicate no title to the infant, as the infant could not hold adversely until he arrived at the age of twenty-one years.

The jury found a verdict for the defendant, and a motion for a new trial having been made and overruled, the plaintiff prosecutes this writ of error to this court.

Per Cur. Green, J. The court further charged, that "a possession of three years by an infant would not be an adverse possession, nor until the child arrived at twenty-one could be adverse." In this, also, there is error. The possession of an infant, either by himself or his guardian, may as well be adverse as to all other titles, as though he were an adult. Infancy protect a party from the consequences of many of his acts; but no one else can take advantage of that infancy. Judgment reversed.

17.

KEGLER V. MILES. Jan. T. 1825. Martin & Yerger's Tennessee Rep. 426.

Per Cur. Catron, J. In this cause, the facts are substantially these: Hartwell Miles, in 1815, was very dissipated, and had wasted most of his property, and was tending towards insolvency. Wm. Boyd paid his debts, and took his plantation in payment. Some negroes were left; of one of them, now in controversy, he made a bill of sale to his daughter Nancy, then about 14 years old. No consideration was given, and it was made avowedly in anticipation of future insolvency. In 1816, or 1817, Nancy married David Kegler, the plaintiff; the slave was taken into Kegler's possession, by virtue of the bill of sale, and continued so until 1822, when Nancy, the wife, died, leaving two children. Kegler then

An infant may hold adverse possession of a slave, either by himself or guardian, and such possession for three years will vest the title of the slave in the infant.

The adverse possession of a slave so long as to bar any action which could be brought against the possession, vests in him an absolute right of property.

resided in Mississippi. Kegler, soon after the death of his wife, returned to the house of his father-in-law, Hartwell Miles, in Davidson county, Tennessee, with the negro girl and his two children. He made a deed of gift of the girl to the children, which was duly acknowledged, and registered in Davidson county. The bill of sale made by Hartwell Miles to his daughter, in 1816, was not registered until 1825, after the suit was brought. Soon after making the deed of gift, Kegler left Tennessee, leaving the negro girl and his children with Hartwell Miles. In 1823, Hartwell Miles took the negro to Rutherford county, and sold her to Peter N. Smith, and made a bill of sale for her, which was duly proven and recorded. Smith paid a full price, and believed he was acquiring a good title. He loaned the slave to his brother-in-law, Thomas Miles, who was sued in this action of Kegler's children. The jury found for the plaintiffs, upon the complicated matters of law and of fact arising under the statute of frauds and registry acts. The court charged the jury. A new trial was moved for, and refused; and the whole evidence set out. That Nancy Miles, before her intermarriage with Kegler, acquired no valid title, as against a purchaser from Hartwell Miles, is a perplexed question of law and fact; that Kegler acquired any title in consideration of the marriage, depends upon facts, doubtful in their character. There can be little doubt he claimed title by virtue of the bill of sale to his wife only. But one simple and undisputed fact exists in the cause, to wit: that Kegler took possession of the slave as his own, and held her as such adversely to all others, for more than three years before he conveyed to his children. That the act of limitations gave him a good title to defend himself, and barred the remedy of all others, is certain; but did it vest in Kegler an absolute title, which he could assert as plaintiff? is the question. It is contended, that the *remedy* of Hartwell Miles was barred, but the *right* remained; consequently, if he got possession of the slave by *recaption*, the right and possession were again united; of which he, or those claiming under him, could not be deprived by Kegler, to whom the statute gave the power of resistance, as a defendant, vesting no right that could be asserted as plaintiff; that the statute alone operated upon the remedy, without touching the right. Such are the reasonings upon the statute, when applied to debtor and creditor in the English and American courts. That a claim barred by time is a good consideration for a new promise, is settled beyond controversy. *Clementson v. Williams*, 8 Cranch's

Rep. 72. 74.; 3 Munf. Rep. 181. 197.; Bell v. Rolandson, Hardin's Rep. 301. Does the same rule apply to the slave property of the slave holding states? In the application of the statute to this description of property, the American courts, of necessity, must fix rules of their own; it is peculiar in its character; and English jurisprudence furnishes no precedents that can materially aid us. The slave passes by deed, and is not regularly assets in the hands of the administrator. All the other goods must first be exhausted, and then the county court will order the sale of the slaves. Our laws, and those of Virginia, equally in force in Kentucky in these respects, are the same in substance. Were the doctrines contended for by the counsel for the plaintiff in error the true ones, this consequence would follow: A. gets possession of B's. female slave, say in Virginia, brings her here, sells her to an innocent purchaser, who keeps her ten or twenty years; she then has increase; the right of the mother is in the Virginia claimant; the increase follow, of course, the original right: before the child is three years old, the original claimant sues for, and recovers it. Did the woman have ten children, all would be recovered in the same manner. The *use* of the mother would be in one man; the right unbarred, to the increase in another. The next consequence is, A. that holds a slave three years, and the remedy is barred as to him; but the statute communicates no right; he then sells to B., who cannot avail himself of the bar formed by the statute in favor of the first possessor, and the latter can be sued at any time within three years after his possession is acquired. Such is the doctrine declared by Judge Haywood, in *Blanton v. Caulson*, 3 Hayw. Rep. 155-6. It is also declared, that no property is acquired by three years' possession; the remedy by action is barred, but the right of recaption exists. No such question was involved in that cause; and the suggestions made by Judge Haywood were used as an argument to prove, that a want of knowledge in the plaintiff where his property was, until within three years before action brought, would be a good replication to the statute of limitations. The cause was again brought before the supreme court, at Sparta, in 1825, and was adjudged for the defendant, because the replication, that the plaintiff did not know where his property was, &c., was holden bad, and the suggestions, reported in 3 Haywood, were overruled.

This decision was in accordance with that of *McGinnis v. Jack and Cocke*, made at Knoxville, 1825. Nothing could be imagined

much more dangerous to the repose of society, than the recognition of the principle, that although the remedy was barred, the right of *recaption* existed, in cases of dormant claims to slaves. That this mode of asserting the claim would result in personal violence of the most dangerous character is certain. No authority is found giving sanction to such an idea. The better opinion is, that when the right exists *unbarred*, and the true owner, by violence, or by a tortious and unlawful act, obtains possession of the slave, he shall not be permitted to set up his better title, when sued by him who was tortiously deprived of the possession. To do so would be to permit the defendant to take advantage of his own wrong. 3 Hen. & Munf. 61. ; 2 Tenn. Rep. 98. ; 1 Hayw. Rep. 13. ; Act of 1779, ch. 11,; Act of 1799, ch. 28. Slaves having *mind*, the rule laid down in 3 Black. Com. 4. must be most cautiously applied. He who holds possession of land peaceably for seven years, by virtue of a grant, or deed, acquires a right of soil, and if turned out of possession may regain it by the action of ejectment. Does the same rule hold in reference to slaves, when the *remedy* of the owner is barred by three years' adverse possession? So we hold ; and that three years' possession of the slave in question, *acquired without fraud or force*, gave to David Kegler a legal title to her, and that the plaintiff ought to recover in this action. We feel it our duty, as also our inclination, to follow the decisions of sister states where slavery exists. Such has been the course of decision in Virginia. *Newby v. Blakey*, 3 Hen. & Munf. 56. 66. In the Supreme Court of the United States. *Brent v. Chapman*. 5 Cranch's Rep. 358., followed in *Guy v. Shelby*, 11 Wheat, 571., and of Kentucky, in *Thompson v. Caldwell*, 3 Little's Rep. 136. The judgment of the circuit court must, therefore, be affirmed.

(F.) BY POSSESSION* WITHIN THE STATUTE OF FRAUDS, AND
FRAUDULENT CONVEYANCES.

1.

ORR et al. v. PICKETT. Oct. T. 1830. 3 J. J. Marshall's
Rep. 268.

Per Cur. Underwood, J. Under the statute of frauds five years' continued possession of a slave, holding the slave upon a loan, or under the title of another, who claims a reservation, or limitation of an use, or property in the slave, is rendered fraudulent, as to creditors and purchasers, and the absolute property declared to be with the possession, unless the loan, reservation, or limitation of use, or property, were declared by will, or deed in

Under the
statute of
frauds.

* There is an extended and an enlightened review of the authorities in Kent's Com. vol. 2. p. 512., upon the subject, how far the sale of goods is affected by fraud, by the possession not accompanying the sale or transfer. After a review of the English cases, he observes, that the Supreme court of the United States, in *Hamilton v. Russel*, 1 Cranch's Rep. 309., have adopted the rule laid down in *Edwards v. Harben*, 3 T. Rep. 618., that if the vendee took an absolute bill of sale, to take effect immediately, by the force of it, and the goods remain in the possession of the vendor for a limited time, such absolute conveyance without the possession was such a circumstance as, *per se*, made the transaction fraudulent in law. Which decision is now obligatory in the United States courts. The same principle has been adopted in Virginia. *Alexander v. Deneale*, 2 Munf. Rep. 341. But the principle seems to be modified by *Loud v. Jeffries*, 5 Rand. Rep. 211., and *Clayton v. Anthony*, 6 Rand. Rep. 285., and the cases in the text. The same principle has been adopted in South Carolina. *Kennedy v. Ross*, 2 Const. Rep. 125.; *Hudnal v. Wilder*, 4 M'Cord's Rep. 294. But recent cases in that state seem to have adopted the doctrine, that the want of possession accompanying an absolute and unconditional sale, is only *prima facie* evidence of fraud. *Smith v. Henry*, 2 Bailey's Rep. 118. In Kentucky and Tennessee, the case of *Edwards v. Harben*, is respected and followed. It would seem, however, that in Kentucky the principle is modified by the case of *Wash v. Medley*, 1 Dana's Rep. 269. The rule prevails in its full force in Pennsylvania, except in the case of household goods. *Dawes v. Cope*, 4 Binney's Rep. 258.; *Babb v. Clemson*, 10 Serg. & Rawle, 419.; *Clow v. Woods*, 5 S. & R. 275.; *Welsh v. Hayden*, 1 Penn. Rep. 57. And the same rule prevails in New Jersey. *Clumar v. Wood*, 1 Halst. Rep. 155.; but is qualified by *Sterling v. Vancleve*, 7 Halst. Rep. 285. So, also, in Connecticut. *Patton v. Smith*, 5 Conn. Rep. 196.; *Smith v. Thompson*, 9 Conn. Rep. 63. So also, in Vermont, the court held, that in sales of personal property, if the seller remained in possession after the sale, it is fraudulent and void as to creditors. *Boardman v. Keeler*, 1 Aiken's Rep. 158.; *Fletcher v. Howard*, 2 Aiken's Rep. 115.; *Beattie v. Robin*, 2 Vermont Rep. 181.; *Judd et al. v. Langdon*, 5 Vermont Rep. 231.; *Fahnsworth v. Shepard*, 6 Vermont Rep. 521.

In North Carolina the rule is relaxed: the want of possession in the vendee is only *prima facie* evidence of fraud, and may be explained. *Gregory v. Perkins*, 4 Dev. N. C. Rep.

writing, proved and recorded.* And in *Meaux v. Caldwell*, Fall T. 1810., 2 Bibb's Rep. 244.; *S. P. Gillespie v. Gillespie*, 2 Bibb's Rep. 8.

Held by the court, *Clark, J.*, that a loan of slaves is within the statute of frauds, and must be evidenced by will or deed, recorded, to be good against creditors and purchasers. Five years' possession gives an absolute right to the loanee, so far as it relates to creditors and purchasers, unless a demand has been made and pursued, by the course of law, before the expiration of that period. As, where a person lending slaves, suffers them to remain 5 years with the person to whom the loan is made, during which time the possessor contracts debts, and the lender then retakes the slaves, they are, nevertheless, liable to satisfy those creditors, the loan not

50.; *Leadman v. Harris*, 3 Dev. Rep. 146.; and so, also, the same principle is established in Tennessee, *Callen v. Thompson*, 3 Yerger's Rep. 475. 502. And in New York, by the case of *Bissell v. Hopkins*, 3 Cowen's Rep. 166, the same principle was recognized. And in New Hampshire, *Haven v. Low*, 2 N. Hamp. Rep. 13. And in Massachusetts, *Brooks v. Powers*, 15 Mass. Rep. 244.; *Bartlett v. Williams*, 1 Pick. Rep. 288. Chancellor Kent, in the review before referred to, regrets that the principle, whether the absence of possession in the vendee or loanee shall be evidence of fraud, *per se*, or only *prima facie* evidence, and subject to explanation before a jury, is so fluctuating and so variously decided in the courts of the states. It is obvious, from the general tenor of the review, he is in favor of the rule as recognized in *Edwards v. Harben*, and in the United States Court, in *Hamilton v. Russel*. He calls it the conservative principle, and one calculated to prevent frauds.

* In *Hamilton v. Russel*, 1 Cranch's Rep. 309, the court held, that an absolute, unconditional sale of property, where the possession does not accompany and follow the deed, is fraudulent, and must be so determined by the court. *Tolcot v. Wilcox*, 9 Conn. Rep. 134., is to the same effect. *Story, J.*, in *Conrad v. the Atlantic Insurance Company*, 1 Peters' Rep. 386., says, "without undertaking to suggest whether, in any case, the want of possession in the thing sold, constitutes, *per se*, a badge of fraud, or is only *prima facie* a presumption of fraud, a question upon which a diversity of opinion has been expressed," avoiding the expression of an opinion on the point. But in *Bissell v. Hopkins*, 3 Cowen's Rep. 166., *Savage, Ch. J.*, held, it was only presumptive evidence of fraud, and might be explained, and was a proper subject for the jury. And the same principle was recognized and established in *Jackson v. Timmerman*, 7 Wend. Rep. 436. In this case, *Sutherland, J.*, observed, that whether fraudulent or not, was in this, as in all other cases, a question of fact for the jury. There being no such thing as fraud in law as distinguished from fraud in fact. What was formerly considered as fraud in law, or conclusive evidence of fraud, and to be so pronounced by the court, is now *prima facie* evidence to be submitted to, and passed upon, by the jury. The rule may therefore be considered as settled in New-York, contrary to the English cases, and that laid down in *Hamilton v. Russel*. And the rule is broken in upon in Tennessee, by the case *Callen v. Thompson*, 3 Yerger's Rep. 475.

having been declared by any public act whereby creditors could take warning that the slaves were only loaned.

2.

FITZHUGH et al. v. ANDERSON et al. April T. 1798. 2 Hen. & Munf. 289.; VERDIER v. LEPRETE, 4 Louisiana Rep. 41.; THOMAS v. THOMAS, 2 Marshall's Rep. 430.

Appeal from the following decree of the superior court of chancery, for the Richmond district: "That a father, putting his son in possession of slaves, and suffering him so long to retain them, (20 years,) and to convert to his own use their labor and services, that the son thereby obtained a delusive credit, ought to be deemed to have *given* the slaves to his son, in a controversy between the father and volunteer claimants under him, and purchasers, or creditors of the son, unless his possession had been, by some written act registered in a reasonable time, and in a proper office, shown to have been fiduciary, or no more than usufructuary by some written publication in solemn form premonishing people with whom the son should deal that he was, although the visible, not the real owner." The decree was appealed from.

The doctrine is principally founded on the delusive credit which is given to the loanee by the possession.

Per Cur. Tucker, J. The lapse of time between the loan (if in fact it were a loan) of the slaves by the father to the son, being nearly or quite twenty years, the period between the sale and the death of the father, the limitation is a complete bar in analogy to the statute of limitations. Five years peaceable possession of a slave will operate as a bar to the recovery by the former owner, unless some express bargain or agreement be proved, showing that the possession of the *holder* is, in fact, in the possession of *him* who claims the property. If no such proof be adduced, the law construes the property to be in him who hath the unqualified possession for such a length of time.

3.

HOOPER'S ADM'X v. HOOPER. Sept. T. 1801. 1 Overton's Rep. 187.

Held by the court, that if a father represent a negro to be the property of his son, who is about to marry, and which representation induces to the marriage, and delivers possession of the slave, and permits that possession to continue through the son's life, who also claims the negro as his own, it is a gift. The acknowledgment

And the acknowledgment of the loanee that the property belongs to the loaner will not avail.

of the son, that the slave belongs to the father will not be received in opposition to the claim of the widow of the son.

4.

ORR et al v. PICKETT et al. January T. 1830. 3 J. J Marshall's Rep. 279.; KENNINGHAM v. M'LAUGHLIN, 3 Monroe's Rep. 30.

The rules
to who
shall be
considered
in posses-
sion.

Per Cur. Underwood, J. Where there are many persons living together, constituting one family, and there are slaves in the service of the family subject to the occasional orders of each member of it, the possession in law should be considered and regarded as in those of the family who have the right to the property. In such case, if an infant be the real owner, and have title to a slave, the infant should be regarded as in possession, although the father controls the slave, and causes it to work as he pleases. So, also, if the title be not in the infant, but in another, who is bound to hold the title for the use of the infant; then we are of opinion the possession should still be considered with the infant, as *cestui que use*, although the father directs and superintends the labor of the slave. If parents and adult children live together, and slaves wait on the family promiscuously, as they may be ordered, and the father as the head of the family should superintend and direct the most important employment of the slaves, still possession should be regarded as being with those of the family who have title. Where many persons are in the enjoyment of the use of property, be they adults, or infants in part, those who trust upon the faith of the property are bound to discriminate, and to ascertain, at their peril, who has title among those using the property. When the title, whether it be legal or equitable, is found to be in one who, with others, seems to be enjoying the use in common, the possession in law is fixed with that one having title, and his creditors alone can reach the property.

5.

MIDDLETON v. CARROL. June T. 1830. 4 J. J. Marshall's Rep. 143.

The rule in
Kentucky.

Held by the court, *Buckner, J.*, that an unconditional sale of slaves, where possession remains with the vendor, is, *per se*, fraudulent against creditors and purchasers.

6.

VERDIER v. LEPRETE. May T. 1832. 4 Louisiana Rep. 41.

Per Cur. Martin, J. A vendee who suffers personal property purchased to remain in possession of the vendor, and thus enables him to acquire credit, or deceive a subsequent purchaser, cannot resist the claim of his vendor's creditor, nor that of a subsequent *bona fide* purchaser. And Louisiana.

7.

HOBBS v. BIBB. July T. 1827. 1 Stewart's Alabama Rep. 54.; S. P. AYRES v. MOORE, *ibid.* 336.; MARTIN v. WHITE, *ibid.* 163.

Hobbs purchased slaves of J. & J. Estells for a debt they owed him, and left them in their possession on hire, and while in their

Possession of personal property remaining in the vendor is presumptive evidence of ownership which may be rebutted,* but it is not evidence of fraud, *per se*.

* Fraud vitiates all contracts. Even a private act of the legislature may be avoided, if it was obtained by deception and fraud. Commonwealth v. Breed, 4 Pick. Rep. 460. Parsons, Ch. J., observed, in Bliss v. Thompson, 4 Mass. Rep. 488., that, it is generally true, that a man shall not be required to aver against his own deed. But the case of fraud is always excepted, which vitiates every contract. A vendor of goods is bound to disclose a latent defect, if known. Hugh v. Evans, 4 M'Cord's Rep. 169.; yet the sale and delivery of goods will pass the title as between the parties, although obtained by fraud. Rowley v. Bigelow, 12 Pick. Rep. 307.; Somers v. Brewer, 2 Pick. Rep. 184. And whether there is fraud or not, must depend upon the peculiar circumstances of each case. In general, it is not a conclusion from a single fact, but from all the facts; and is, therefore, a proper subject for inquiry by a jury in a court of law. Watkin's v. Stockett's Ad'mr, 6 Har. & Johns. Rep. 435. 455. And there must be a fraudulent design. Young v. Covell, 8 Johns. Rep. 23. When matters are alleged to be fraudulent in a court of law, it is for the jury to find the facts, and determine their character. Gregg v. Lessee of Sayre and Wife, 8 Conn. Rep. 244. And it may be laid down as a general principle, that a conveyance of lands or goods liable to be set aside for fraud, will be good in the hands of a bona fide purchaser of the vendee without notice. Fletcher v. Peck, 6 Cranch's Rep. 133.; Mowrey v. Walsh, 8 Cowen's Rep. 233; Hollingsworth v. Napier, 3 Caines' Rep. 182. And it may also be laid down as a general principle, that on the absolute sale of goods possession must accompany the deed, and the want of change of possession is considered, *per se*, such a circumstance as to render the transaction fraudulent and void. Talcott v. Wilcox, 9 Conn. Rep. 134.; Patten v. Smith, 4 Conn. Rep. 455; Burrows v. Stoddard, 3 Conn. Rep. 160.; Chumar v. Wood, 1 Halst. Rep. 155.

The leading case in which this principle has been effected, and in which the exceptions to the rule are stated, is in Bissell v. Hopkins, 3 Cowen's Rep. 166. It was held in that case, that possession of goods remaining in the hands of the vendor after sale, is but *prima facie* evidence of fraud as to creditors, and may be explained. Bissell v. Hopkins, 3 Cowen's Rep. 166. Numerous cases are cited in the note to the case, to show, that the English rule is incumbered with so many exceptions as to be no longer of use in any practical application to the subject of frauds. Where the sale is absolute, however, there can be but little doubt that the interest of society would be

possession they were seized under an execution against Estells, by a judgment creditor, the defendant, whose judgment was entered about the time of the sale to Hobbs.

The court charged the jury, that although no fraud may have been intended by the parties, and although a fair price may have been actually paid by Hobbs, and although the contract of hire from Hobbs to Estells might be also *bona fide*, for a fair price, and without intentional fraud, yet that the possession of the property remaining with Estells was fraud of itself, as to creditors, and rendered the title of Hobbs inoperative. Hobbs excepted.

Per Cur. Lipscomb, Ch. J. After referring to Shepard's Touchstone, 66., Twyne's case, 3 Cooke's Rep. 87., Edwards v. Harben, 2 T. Rep. 587., Kid v. Rawlinson, 2 Bos. & Pul. 59., Lady Arundel v. Phips et al., 10 Vesey's Rep. 145., Stewart v. Lomb, 1 Broad. & Bing. 506., Watkins v. Burch, 4 Taunt. Rep. 823., Hamilton v. Russel, 1 Cranch's Rep. 399., Ludlow v. Hurd, 19 Johns. Rep. 221., and Bissel v. Hopkins, 3 Cowen's Rep. 166., decided, that personal property remaining with the vendor is presumptive evidence of ownership in him; but this presumption may be rebutted by proof: possession remaining with the vendor is ruled to be only *prima facie* evidence of fraud. And in Echols v. Derrick, 2 Stewart's Rep. 144., the court held, that where A. purchased at sheriff's sale, without notice, a slave which had been previously conveyed by deed in trust, but the deed not recorded in the manner required by the statute of frauds, and after the sheriff's sale, and before the expiration of twelve months from the date of the deed, the trustees sold the property, and executed the trust, the statute dispensing with the registry within twelve months, the adverse possession of A. under his purchase at the sheriff's sale, made no difference, and did not prevent the trustees from executing his trust. And see Astor v. Wills, 4 Wheat. Rep. 466.

best promoted to hold it evidence of fraud, where the property was not changed. But in qualified sales, mortgages, loans, &c. of property, it seems to be necessary in those complicated arrangements of which property is susceptible among families, that they should be open to explanation, and that the mere want of change of possession should not, *per se*, be evidence of fraud. And that is probably the true distinction which might be drawn from the cases. It is the principle laid down in Hamilton v. Russel, 1 Cranch's Rep. 309., and is sustained by a great number of cases, English and American. It is obvious, however, the rule does not apply where the property is so situated it cannot be delivered. Conrad v. Atlantic Ins. Co., 1 Peter's Rep. 386.; Bissel v. Hopkin's, 3 Cowen's Rep. 166.; Callen v. Thompson, 3 Yerger's Rep. 475.

8.

AYRES v. MOORE. January T. 1830. 2 Stewart's Rep. 336.

Trespass by Moore against the defendant, for taking away a negro boy Tom. Ayres pleaded, that he levied on the boy as sheriff, the boy being the property of one James B. Moore, by virtue of an execution against him. The plaintiff relied on a bill of sale to him for the negro, by James B. Moore, in March, 1825, for the consideration of \$225, to be paid at Christmas; and which was duly paid, and the bill of sale duly recorded. The sale took place at the house of James B. Moore, when the slave was delivered by putting his hands into the hands of the purchaser, who afterwards went home, leaving the slave in the possession of the vendor. About six weeks after the plaintiff took the boy home, but went backwards and forwards from the house of the purchaser and vendor, but was some time after, continually at the house of the purchaser. The defendant gave in evidence a mortgage of the boy, made after the sale to one Brittain, who forcibly took the boy, and retained him near twelve months, until J. B. Moore satisfied the debt, when the boy was returned, and again went into the possession of William Moore.

But it is for the jury to say whether it was made to hinder or delay creditors,

The counsel for the defendant requested the court to instruct the jury "that if they believed the possession did not accompany and follow the bill of sale from J. B. Moore to the plaintiff, William Moore, at the time of its execution, that then the said bill of sale was fraudulent in law, as against creditors and subsequent purchasers." But the court refused, and charged them, "that if they believed that the consideration of the bill of sale was *bona fide*, and that it was duly recorded, it was good and valid in law, though the negro remained in possession of the vendor previous to that time."

The Court, *Lipscomb*, Ch. J., and *Saffold*, J., both gave opinions, and after referring to *Hobb v. Bibb*, *supra*; *Bissell v. Hopkins*, 2 Cowen's Rep. 431., *Barron v. Paxton*, 5 Johns. Rep. 261., *Dawes v. Cope*, 5 Binney's Rep. 265., *Brooks v. Powers*, 15 Mass. Rep. 244., *Howell v. Elliott*, 1 Badger & Dev. Rep. 76., *Clow v. Woods*, 5 Serg. & Rawle's Rep. 275., held, that where the vendor remains in possession of personal property sold, it is not sufficient, as against creditors, that the consideration of the sale be *bona fide*, and the bill of sale recorded; it must appear that the sale was not made to

hinder or delay creditors; and whether it was made to hinder or delay creditors, is to be determined by the jury from all the circumstances.

9.

GARTH'S EX'RS v. BARKSDALE. March T. 1816. 5 Munf. Rep. 101. ; GAY v. MOSELY, 2 Munf. Rep. 543. ; BEASLEY v. OWEN, 3 Hen. & Munf. Rep. 449.

Five years' peaceable possession of slaves, under a loan by parol agreement, vests the title in the loanee, subject to his creditors, and which cannot be divested by returning them after the expiration of the five years.

Trespass brought by Barksdale against Garth, sheriff, for unlawfully seizing two slaves. The plaintiff claimed the slaves, as having been the original owner, and only having lent them to Barksdale, who had married his daughter; the defendant undertook to prove that the slaves had been in Barksdale's peaceable and uninterrupted possession for five years from the time when they were first loaned him, and before the service of the execution.

The court instructed the jury, that if the slaves loaned by the plaintiff to Barksdale, had, *before* the expiration of the five years, been returned, by the consent of the lender and borrower, that would interrupt the possession; and that even if the borrower, after five years' possession of the slaves, had surrendered the same to the lender, the lender's right to the slaves became revested in him, so as that, in neither case could an execution, in behalf of a creditor against the borrower, which issued subsequent to the last return of the slaves into the borrower's possession, be levied on said slaves, although in the borrower's possession at the time of levying said execution, unless five years had again elapsed after the possession of said slaves was restored to the borrower. Verdict for plaintiff; and the defendants appealed.

Per Cur. The Court is of opinion, that the instruction of the superior court is erroneous in this, that the five years' possession of the negroes by Douglas Barksdale, if proved, vested a title in him, which enured in favor of his creditors, notwithstanding he might thereafter have returned the same to the plaintiff, from whom he had received them. Judgment reversed. See *Boyd et al. v. Stainback et al.*, 5 Munf. Rep. 305. Where the court declared, that a loan of slaves, though not declared by deed in writing, duly recorded, and therefore void as to creditors, (the loanee having continued in possession five years without such demand as would bar their right,) is nevertheless effectual between the parties and their representatives. If, therefore, the loanee die in possession, they are not to be considered as assets belonging to his estate, nor

can be recovered as such ; being liable to his creditors, so far as their claims remain unsatisfied by the assets in the hands of his executor or administrator, but no farther. And if the assets be deficient, a court of equity will give the creditors relief ; they will make the assets liable, in the first place, so far as they extend, after which it will allow the lender a limited time to make good the deficiency, and in default thereof, a sale of the slaves.

(G.) BY PRESCRIPTION.

1.

BROH v. JENKINS. April T. 1821. 9 Martin's Louisiana Rep. 526.

This suit is brought by the plaintiff, as heir to his mother, to recover a slave named Lazare. The testimony on the part of the plaintiff is, that he is the only child of Madame Broh ; that the slave Lazare belonged to her in the year 1803, when she resided at Jeremy, in the island of St. Domingo ; that she sent him to Charleston in that year ; that she died at Baracoa, about the end of 1808, or beginning of 1809 ; that the plaintiff was born in 1792, or 1793, and was consequently 26 or 27 years old when this suit was commenced. The testimony on the part of the defendant is, that Lazare was in possession of Mr. Placide, in Charleston, about fourteen years before this suit was commenced, where he always remained, until sold to defendant ; that Placide sold him to Dastras on the 26th day of May, 1806, who possessed him, as owner, until his death, in the summer of 1817, a term of eleven years ; that he was in October, 1817, sold to Lazarus ; that Lazarus sold him to defendant, on the 2d of August, 1819, in Charleston, South Carolina. The plaintiff arrived here in 1809. The negro Lazare was brought here by the defendant, in the month of August, 1819, and this suit was commenced the 15th September, in the same year. The defendant sets up the title of prescription by virtue of possession, in himself and others, under whom he claims, founded on the several sales which were produced. The principal question in this case was, by what law will the court judge of the prescription : that of South Carolina, where the slave was, or that of this state, where the suit is brought.

If a slave be claimed by prescription, the question is to be examined according to the laws of the country in which he was thus acquired.

Porter, J. The presiding judge of this court has gone so fully

into the case, in the opinion which he has prepared, that I shall confine my examination to what I consider the main question in the cause, and that is, whether the statute of limitations of South Carolina has vested a title to the slave in the defendant. This inquiry, I think, will be best conducted, by pursuing the following divisions of the subject :—

1. Did the statute vest a title in South Carolina ?

2. Whether the owner of the property is bound by a law of this description, when it was proved that he did not reside in the country where it was enacted ?

3. Supposing the title to have been vested, in the state where the statute was in force, is there any thing in our laws which prevents the defendant claiming the benefit of that title here ?

I. The statute of South Carolina is an act of limitation, and from the perusal of it alone, it might be doubted whether it was any thing more than a bar, which could be plead by the possessor, to an action in which the property was demanded. But it appears that judicial interpretation of the act has held, that it vests title ; and there is no doubt, from the decisions in that state, that there the person claiming slaves under the statute could recover them in the hands of another, as well as plead the act to an action commenced. 2 Bay's Rep. 156. 425.

II. The next point, whether the plaintiff, not being a citizen, or resident of South Carolina, can lose his right to property by a law of that country, is that which has presented the most difficulty to my mind. If it had been shown in this cause, that both parties were citizens of that state, I should have no doubt that both were bound by these laws, in virtue of which the one acquired, and the other lost a title to the property ; and that the right thus acquired would not be destroyed by the removal of one of the parties into another country.

It is stated by Huberus, an eminent writer on the subject, that whoever makes a contract, in any particular place, is subject to the laws of the place as a temporary citizen. 3 Dall. Rep. 370., *in note*. The rule is held to apply, where a contract is made in one country, to be executed in another, and the law of that where the agreement is to be performed, will form the rule of action for the parties. Now, although it has not been shown, that the plaintiff, or those under whom he claims, ever were residents or citizens of South Carolina, or that they made any contract there, in relation to the property now sued for, yet enough, I think, has been proved to

enable us to apply, safely and correctly, the principles of law just stated, to the case now before the court. For as the evidence establishes, that the slave in question, was sent by the plaintiff's mother into South Carolina, under the care of an agent, this was a voluntary placing of her own property under these laws, to enjoy their protection ; to take their advantages, if any in relation to it ; and consequently, to bear with their inconveniences.

III. If the title set up here was by sale, donation, exchange, or any other contract made in South Carolina, we should hold it good here, if it was so in that state, and the only inquiry would be, did it vest title there ? Prescription is a mode of acquiring property. Civil Code, 482., art. 32. ; *Pothier, Traité de la Prescription*, chap. 1. As strictly so as the cases of contracts just put. Digest, liv. 50. tit. 16. loi, 28. If in a common case of alienation, we hold it good and valid, because the laws of the country where it was made held it so, I cannot see any good reason to reject that of prescription ; for it vests and divests title, by the very same authority which declares that other species of contracts have that effect. In some of our sister states it has been held, that in a suit for the recovery of money, the law of limitation in the state where the suit is brought must govern the rights of the parties, and not that, where the contract was made. There is a clear distinction, in my mind, between cases of that description, when the statute is pleaded as a bar to the demand, and that now before the court, when it vests a complete title to a specific thing ; for I have already stated, that I cannot distinguish between the title conferred by prescription, and that acquired by any other mode of alienation and acquisition. When the question does occur here in a suit for money, it will be then time enough to examine, whether the law of this state, as it regards the limitation of actions, or that where the parties contracted and hired, shall govern their rights ; or if the decisions on this subject can be reconciled with the principles of law, or supported by the authorities on which they profess to rely. I am therefore of opinion, that the judgment of the parish court be affirmed, with costs.

Martin, J. I have carefully considered the opinion which Judge Mathews has prepared, and is about to read, and perfectly concur with him.

Mathews, J. This suit is brought to recover from the defendant a slave in his possession, claimed by the plaintiff, as sole heir to his mother, in whom he alleges title, at the time of her death. The defendant relies on a title derived through several persons re-

siding in South Carolina, and on a right acquired by possession and prescription. Judgment being for the defendant in the court below, the plaintiff appealed. The evidence on the part of the appellants, which is entirely oral, establishes his heirship, as alleged, and shows that his mother *had* the slave in dispute while she resided in the islands of St. Domingo and Cuba, from which latter place she sent him to South Carolina. The acts of sale offered by the appellee to support his title were objected to by the counsel of the plaintiff, as not being sufficiently proven; and bills of exceptions regularly taken to the opinions of the judge of the court, *a quo*, by which they were allowed to be given in evidence. But from the investigation which I have given the cause, it is deemed unnecessary to examine those exceptions; as the testimony, received without opposition, clearly establishes an uninterrupted and peaceable possession, of at least fifteen years' duration, in the persons under whom the defendant claims. Admitting that the evidence in the case draws title in the ancestor of the appellant, and that the defendant's claim rests solely on a title vested in those under whom he holds the slave, acquired by prescription; the first question to be disposed of, as stated by the plaintiff's counsel, is, by what laws must the cause be decided, in relation to the title set up by the appellee? Those of South Carolina, where the property was, or those of this state, where the suit is commenced? I am of opinion, that the validity of this title, by prescription, ought to be ascertained and determined according to the laws of the former state. Were it to be settled by our laws on the subject, there would be little difficulty in deciding the case, as they would not operate on the slave in dispute, previous to his having been brought within the limits of the state. And this did not happen, as is shown by the record, until a month or two before the commencement of the present action. The law of South Carolina, on which the defendant rests his title, is a statute of limitations, prescribing the period within which suits may be rightfully commenced in that state, having for their object and end, the same which is here sought by the plaintiff. The period of limitation is there, four years for persons present, and one more is allowed to those who are absent, making five for the latter, and by the lapse of this time their right of action is barred. It is contended, on the part of the appellant, that this law must be considered as relating only to the remedy, or relief grantable by the courts of justice, and not to the right of property. In other words, that it is *lex fori*, and not *lex loci contractus*;

and that to the former species of laws, a foreign tribunal will give no effect. So far as they relate to the recovery of debts, from the cases cited in support of this doctrine, little doubt can remain of such being the practice adopted by the courts in several states of the union, and supported by the opinions of judges highly eminent for talents and learning. Without admitting or denying the correctness of these decisions, as founded in justice, policy, and a proper comity between the states, I think the case now under consideration may be clearly distinguished from any which have been exhibited to the court. The questions in them decided, turned wholly on disputes about privileges, or a right to recover debts, barred by the laws of limitation which were in force, in the former residence of the contracting parties; and such laws are based solely on a presumption of payment. In no instance was there any contest relative to rights or title, vested in the possessor of property, as a necessary consequence resulting from a statute of limitations, which barred the claim of the owner. Whatever might be my opinion as to the force and effect which ought to be given to the laws of limitation of a foreign state, in relation to the recovery of debts, I have no doubt they may become the means of acquiring title, when they operate so as to prevent the proprietor from recovering his property in consequence of an adverse possession.

Possession of things is *prima facie* evidence of right and title to them; and if it has been of such duration, that the laws of the country where they are situated will not allow the possession to be disquieted, I do not think it, by any means, a forced and unfair construction of law, to decide that title, absolute and indefeasible, is gained by such possession. The owner, by neglecting to use the remedy accorded to him, loses his right, which the *bona fide* possessor acquires. It is perhaps true, that fraud on his part, or excusable ignorance on the part of the proprietor, might require a different interpretation and application of the law of limitation. But in the present case, it cannot be pretended that either of them existed. The evidence shows that good faith accompanied the possession of the slaves in every change of master; and that he was sent by the plaintiff's mother to South Carolina; so that she could not be ignorant of the laws under which he was placed, and her means of redress against adverse possessors.

This view of the subject places a law of limitation to an action for the recovery of property, on a footing with the *usucapio* of the Roman system of jurisprudence, viz. a mean of acquiring property;

nor am I able to discover any incongruity in the principles on which these rules are founded. *Usucapio* is defined in the Roman Digest to be *adjectio domini per continuationem possessionis, temporis lege de finiti*.—It was introduced for the public good, that the titles of property might not forever remain uncertain, after allowing sufficient time to the owners to pursue their claims. D. 41. 3. 1.

In the early periods of states, it may be considered sound policy to make the time for acquiring property by possession of short duration. By the ancient Roman law, as contained in an article of the Twelve Tables, one year of possession was sufficient to save title to moveables, and two to immoveables, being what were termed *res Mancipii*. In regard to incorporeal things, the *Prætor* had established a prescription of ten, and twenty years, or, as it is called, *longi temporis*. At first, under this prescription the possessor did not acquire the dominion of the thing, but only the benefit of an exception, or plea in bar, to any action brought by the proprietor. Afterwards, the *actio utilis* was accorded to the possessor to recover the thing, when he had lost the possession, *pour revendiquer le chose*, as expressed by Pothier. The distinction between *res Mancipii* and *nec Mancipii*, was abolished by the emperor *Justinian*, and *usucapio* and prescription *longi temporis* put on the same footing; this constitution, on this subject, it is believed, forms the basis of the laws relating to prescription in those countries which have founded their jurisprudence on the Roman law; and, in all of them, it is considered a mode of acquiring property. But it is seen, that even before this law of *Justinian*, an action had been accorded to a possessor to recover property of which he had lost possession; and this could only have been regular, on the principle that he had acquired title by such possession. Upon the whole, I am of opinion, that laws limiting the time within which actions ought to be commenced for the recovery of property, may operate in such a manner as to vest a title in a *bona fide* possessor, and that the law of South Carolina has produced this effect in the present case. Judgment affirmed, with costs.

2.

DUNBAR v. NICHOLS. July T. 1821. 10 Martin's Louisiana Rep. 184.

A party
who relies
on pre-
scription
must plead

Martin, J. The plaintiff demands a rescision of the sale of a slave he bought from the defendant, on account of her having been attack-

ed with an incurable disease at the time of the sale. She being dead since, the defendant pleaded the general issue only. There was a verdict and judgment for him, and the plaintiff appealed.

Our attention is first arrested by a bill of exceptions to a part of the judge's charge, in which he said, that "in the opinion of the court, the plaintiff was not founded in his right of action, not having filed his petition within six months after the discovery of the disease." The law has provided defendants with the plea of prescription, that they may use it as a shield to protect themselves against unjust claims, not to use it as a weapon to destroy just rights. The party who uses it in an unrighteous case, sins grievously, and the court neither can or ought to supply the want of it, *ex officio*. When the plea is not made, the presumption is, that the defendant thinks it would not avail him at all, and that he cannot righteously avail himself of it. The district court, in my opinion, erred, in directing the jury to disregard the plaintiff's right, on the ground that it was exercised too late, and I think the judgment ought to be reversed,

Mathews, J. I concur in this opinion. Judgment reversed.

3.

DELPHINE V. DEVEZE. June T. 1824. 14 Martin's Louisiana Rep. 650.

Per Cur. *Porter, J.* The plaintiff urges, she is descended from one Marie Catherine, a negro woman now deceased, who was the slave of a certain Marie Durse, and that the said Marie emancipated, and set free, Catherine, and her children, Florence, Luce, and Cathenine, the mother of the petitioner. She complains that the defendant illegally holds her in slavery, and prays that she may be decreed free, and recover damages for the injury she has sustained by being held in servitude. The defendant pleaded the general issue, and prescription. We shall, before entering on the merits, dispose of the exception, which forms the second ground for defence in the defendant's answer. We do so, by referring to the third partida, title twenty-nine, law twenty-four, in which we find it provided, that if a man be free, no matter how long he may be held by another, as a slave, his state or condition cannot be thereby changed, nor can he be reduced to slavery, in any manner whatever, on account of the time he may have been held in servitude. The plaintiff is entitled to her freedom.

Prescription is never pleadable to a claim of freedom.

4.

CHRETIEN V. THEARD. June T. 1824. 14 Martin's Louisiana Rep. 582.

Prescription is interrupted by an action in which the plaintiff is non-suited.

Per Cur. Porter, J. This is a redhibitory action, in which the plaintiff seeks to return a slave he purchased from the defendant, and get back the price. The defect alledged is, that the slave is a thief, and addicted to robbery, and it is further charged, that the vendor knew he had those vices at the time he sold him. An action, founded on the same cause as the present one, has been already before us. 11 Martin, 11. The plaintiff was there non-suited, because he had not furnished proof that he brought suit within six months after he obtained the knowledge of the defect. The present record shows, that he fully removed this objection. Several grounds of defence have been presented in this court against the right of the petitioner to recover. The last point is that of prescription. On this head the counsel for the defendant referred to several authors who have written on the French law. According to them, prescription is not interrupted by a suit in which the plaintiff's demand is rejected; nor where there is a voluntary abandonment of the action. *Pandecte Françaises*, vol. 7. 581, 582. *Dunod, Traite de Prescription*, 92.; Denissart, vol. 3. 740. It is unnecessary for us to go into the question, how the law stands in that country, or to inquire how much of the doctrine on which the appellant relies, depends on provisions particular to the French jurisprudence. By that of Spain, greater facilities were afforded the creditor to interrupt prescription. According to the 3d partida, title 29. law 29., a simple demand of the debtor, in the presence of witnesses, was sufficient. Why an action in a court of justice, although not followed up to any final judgment, should not have as much effect as a simple request, which is not succeeded by a suit, is not perceived by us. Admitting, however, that it has not, another provision of the law already cited, declares, that prescription is interrupted by a suit, and we find nothing in that law which makes any exception, or which goes to show that this interruption, which is declared to result from a demand in justice, loses effect, because the action is not prosecuted to final judgment. Prescription, says this law, ceases to run *from the time suit is brought*. Of this opinion must have been the compilers of our code, for in transcribing into it the provisions of the Code Napoleon, on the

subject of prescription, they omitted inserting the article 2247, which declares, that if the plaintiff desist from his suit, or if his demand be rejected, prescription will not be interrupted.

5.

PETERS v. CHARES. March T. 1833. 4 Yerger's Tennessee Rep. 176.

Per Cur. Green, J. The latter clause of the 3d section of the act of 1801, ch. 25, declaring valid all loans *bona fide*, &c., &c., must be taken as applying only as between the persons receiving and making a loan of property. Any other construction would make this provision inconsistent with the plain meaning of the latter clause of the second section of the same act. The negroes in question, were in the possession of Daniel Brown, more than five years before the boy Robert was levied on. The loan was not declared by will, or by deed in writing proved and recorded. As to this creditor, the property was with the possession. Independently of this question, the jury were justified, from the evidence, to find the verdict they rendered in this cause.

The latter clause of the third section of the act of 1801, ch. 25, only applies as between the loaner and loanee; therefore, five years' possession of a slave which is not declared by will, or by writing duly registered, although *bona fide* loan, vests the property, as to creditors, with the loanee.

6.

METAYER v. METAYER. Jan. T. 1819. 6 Martin's Louisiana Rep. 16.

Derbigny, J., delivered the opinion of the court.

The defendant, Adelaide Metayer, a woman of color, is in possession of her freedom, since a number of years. A person who calls himself her master, now sues to make her return to a state of slavery. It was at first doubted, whether the plaintiff had proved himself to be the same individual whom the witnesses call the only son and heir of Charles Metayer of Cape François, who was the master of the defendant, when the revolution of Hispaniola broke out. But, after an attentive perusal of the record, it is now believed, that the plaintiff is sufficiently identified with Metayer's son. The defendant pleads, in general terms, that she is free. She has failed in a former suit, where she was plaintiff in damages for false imprisonment, (*Metayer v. Noret*, 5 Martin's Rep. 566,) to prove her freedom by emancipation under her master's hand; but the evidence in the present case shows that she was in Hispaniola when the general emancipation was proclaimed by the commissioners of the French government, and remained there

A slave who enjoyed her freedom in Hispaniola during the late revolution, may reckon that time in establishing her right to freedom by prescription.

until after the evacuation of the island by the French in 1803, a period of about ten years. It is further proved, that she continued in the enjoyment of her freedom, without interruption, until 1816 ; so that she has lived as a free person during twenty-three years ; that is to say, three years more than the time required by law for a slave to acquire his freedom by prescription, in the absence of his master. The plaintiff objects, that the time during which the defendant remained in Hispaniola, ought not to be included in this calculation, because the abolition of slavery in that island was an act of violence, and that prescription does not run against those who have been so dispossessed, so long as they are prevented from claiming their property, according to the maxim, *Contra non valentem agere nulla currit prescriptio*. But the plaintiff cannot avail himself of this exception, without admitting, at the same time, that the government of Hispaniola, during its divers revolutions, continued to countenance the general emancipation ; and then, instead of the simple fact of possession, the right of the defendant to her freedom by law, would be the consequence ; for, if the abolition of slavery by the commissioners of the French republic has been maintained by the successive governments of the island, no foreign court will presume to pronounce that unlawful which, through a course of political events, has been sanctioned by the supreme authority of the country. Therefore, without entering into this very delicate subject any farther than the present case makes it strictly necessary, we are bound to say, at least, that, by virtue of the general emancipation, the defendant enjoyed her freedom in fact, no matter under what modification ; and that the years which she passed at Cape François, in that situation, must be included in the time during which she did not live in a state of slavery ; which time, at the lowest calculation, exceeds that which is required by law for a slave to prescribe his freedom, in the absence of his master. Judgment affirmed.

7.

METAYER v. NORET. June T. 1818. 5 Martin's Louisiana Rep. 566.

Twenty years' possession of freedom, in the absence of the master, required for the time of prescription.

Per Cur. Dubigny, J. The plaintiff, and appellee, is a woman of color, who complains of having been arrested and imprisoned as a slave by the appellant, and sues him for damages. The fact of the arrest and imprisonment is admitted ; but the defendant, and

appellant, contends, that the plaintiff is the slave of *Jean Pierre Metayer*, whose attorney in fact he shows himself to be. The only question at issue between the parties is, whether the plaintiff is a free person or a slave. *Jean Pierre Metayer* has intervened in the suit; but, as that intervention changes not the situation of the case, there is no necessity to notice it. It is admitted, on both sides, that the plaintiff once was the slave of Charles Metayer, the father of the person in whose behalf the defendant caused her to be arrested. But the plaintiff maintains that she has been enfranchised by him. The evidence, however, which she has introduced in support of that allegation, is of such a nature that it would be nugatory to investigate it. One only circumstance deserves some notice; and that is, her enjoyment of her freedom during a number of years. It is in evidence that the plaintiff, ever since she left Cape François, in 1803, has lived as a free person, first at *Baraça*, in the Island of Cuba, and from the year 1809 at New Orleans. A creditor of her late master caused her to be seized in 1810, as the property of his debtor; but a civil interruption of possession can take place only at the suit of the owner; and this interruption by the owner did not happen until some time in the year 1816; that is to say, after a possession of about thirteen years. By the laws of Spain, a slave can acquire his freedom by a possession of ten years, in the presence of his master, or of twenty years in his absence. It appears in this case, that during all the time that the plaintiff enjoyed her freedom, the master was absent. Thus, according to the Spanish laws, the possession of the plaintiff falls far short of the time required to prescribe. It was doubted whether that disposition of the Spanish laws had not been repealed by the general provision introduced in our code, concerning the prescription of slaves. But, it is believed, that this article of our code is relative only to the acquisition of slaves by prescription, and cannot be construed to embrace the prescription of liberty by themselves. We are, therefore, bound to say, that the plaintiff has not succeeded to prove her freedom, and that she cannot recover any damages for what she calls her unjust imprisonment and detention.

ANDREWS v. HARTSFIELD et al. March T. 1832. 3 Yerger's Tenn. Rep. 39.

A loan of slaves to a married daughter, when possession is continued for five years and upwards, subjects the slaves under the act of 1801, ch. 25. sec. 2., to be levied on and sold for the debts of the husband.

In 1812, William B. Walker married a daughter of the complainant. In 1814, the complainant loaned to his daughter, the wife of said Walker, the slave in controversy. He stated at the time, that he loaned the slave solely to her, for her sole use, and independent of the control of the husband. The loan was generally known in the neighborhood, and was considered the property of complainant. The slave remained in the possession of Mr. and Mrs. Walker from 1814 until 1828, during which time she had two children. They were in that year levied on, and were about to be sold to satisfy the debts of the husband, when this bill was filed to enjoin the sale. The bill was dismissed by the court below.

Per Cur. Green, J. It is proved by the complainants' witnesses (his two sons,) that they were present in 1814 when their father lent the girl Tiller to their sister Mary. He told her to take the girl to nurse her child; to take good care of her, and keep her until he called for her. The girl went into the possession of Walker, and so continued without interruption, until these attachments were levied upon her, a period of fourteen years. By the act of 1801, ch. 25. sec. 2., the reservation of title by the complainant, as to the creditors of Walker, is fraudulent and void; the loan not having been declared by deed, and the possession having continued without interruption more than five years. The third section of this act does not affect the question. That only applies as between the lender and borrower, and saves the right of the former to reclaim and recover the property loaned. The title of this negro must, therefore, be regarded, as to these defendants, with the possession. It is not necessary here to decide, whether a gift by parol, of personal property, to the separate use of a married woman, would be good. This is the ordinary case of a loan to the married daughter, reserving the title in himself. Walker was the possessor of the negro, and no matter what the parties may have intended, or how notorious the complainant's claim of property may have been, the statute is peremptory, and declares that as to creditors the title shall be considered with the possession. Decree affirmed.

(VII.) OF WARRANTY.*

(A) OF WARRANTY OF SOUNDNESS.

1.

THOMPSON v. MILBURN et al. Aug. T. 1823. 13 Martin's Louisiana Rep. 468.

Per Cur. Porter, J. The petitioners sue to obtain the price of a slave. The defendants resist the demand, on an allegation that the negro was unsound, and afflicted with redhibitory diseases, incurable in their nature, at the time they purchased him; of which diseases he died. Two gentlemen of the faculty, who were called on a consultation on the negro, five weeks after the sale, and a short time previous to his death, state, that they found him laboring under a chronic dysentery of long standing; a disease, which, though it may sometimes be cured by proper regimen, generally terminates in death. Three other witnesses state, that the negro

Any disease with which a slave is afflicted at the time of sale, which has progressed so far as to be incurable, may be pleaded as a redhibitory vice.

* A warranty, is an indemnity against the consequences of any defect in the quality or value of the thing sold. And a representation made at the time of sale is a warranty, if so intended. *Pasley v. Freeman*, 3 T. Rep. 57. In general, no implied warranty arises. *Parkinson v. Lee*, 2 East's Rep. 314., unless there be a fraudulent concealment. *Jones v. Rouden*, 4 Taunt. Rep. 847. And whether there is a warranty or not, should be submitted to the jury. *Whitney v. Stinton*, 11 Wend. Rep. 411. Some of the principles of warranty may be thus stated. Warranty is an indemnity for any defect in the thing sold, as was before stated. And they are express or implied. *Borrekens v. Berons, et al.*, 3 Rawle's Rep. 32. And all warranties must be made at or before the sale. *Sweet v. Colgate*, 20 Johns. Rep. 196. Warranties are limited, and do not guard against that which may be discovered by sight, as if a horse be warranted perfect, and he wants an ear or tail. *Butterfield v. Burroughs*, Salk. Rep. 211. And it may be laid down as a general rule, that the vendor is not liable for the quality or soundness of the goods or article sold, unless there be an express warranty, or a fraudulent concealment or misrepresentation. *Wilson v. Shackford*, 4 Rand. Rep. 5.; *Williams v. Stafford*, 8 Pick. Rep. 250.; *Sweet v. Colgate*, 20 Johns. Rep. 196. The exception in the United States, is, in South Carolina, where they have adopted the civil law, which is governed by the maxim that "a sound price requires a sound commodity." *Barnard v. Yates*, 1 Nott & M'Cord, 142.; *Tinrod v. Sholbred*, 1 Bay's Rep. 324. An express warranty of soundness extends to every kind of soundness, known and unknown to the seller, and if it be false, the buyer has his remedy on the warranty. *Onslow v. Eames*, 2 Stark N. P. C. 81. And where there is an express warranty, all implied warranties are excluded; for the law will not imply what is not expressed in a formal contract. *Lanier v. Auld*, 1 Murphy's Rep. 133.

was unwell immediately after the purchase. One called by the plaintiff declared that the negro had been afflicted with the diarrhœa, some time previous to the period when the defendant purchased him; that the physician who attended him had reported him well, and that he had quite a healthy appearance when sold. That section of the civil code which treats of the defects in the thing sold, and redhibitory vices, is by no means the most clear and satisfactory of that work; and since its enactment, several embarrassing questions arising out of its provisions, have been presented for decision. It is now, however, the settled doctrine in this court, that by the term "disease incurable in its nature," must be understood any disease of which the slave is afflicted at the time of the sale, that has progressed so far as to be incurable. Our only inquiry, then, is, do the facts, as proved in evidence, bring this case within the rule? The testimony already detailed, appears to us to show beyond doubt, that the negro was diseased on the day of the sale. The evidence of the physicians satisfies us that it was of that disease he died. Whether it had progressed so far as to be rendered incurable, is the main, and, indeed, the only difficulty which the case presents. The fact is not placed beyond all doubt by the testimony, nor can human testimony ever establish, beyond doubt, at what period a disease is incurable, unless the persons who give it are acquainted with all the means of cure which human knowledge possesses. We, however, have it in evidence here, that the slave sunk under the disease, and it is such as is generally incurable. This we think sufficient to throw the burthen of proof on the other side, and the defendant, aware that it did, has labored to show, that the fact of the disease being incurable, clearly resulted from the testimony. But in this he has completely failed. The evidence, so far from establishing the curableness of the disease, is entirely silent in regard to it. To supply the place of proof, the defendant has resorted to conjecture, and has contended, that we do not know but that if a physician had been called in earlier, the life of the slave might have been saved. We do not know what effect an earlier application to medical aid might have had, and for that very reason we cannot give the plaintiff the benefit of a fact which he has never proved. In the case of *St. Romé v. Poré*, the same argument was resorted to, and was considered of no weight. The court there held, that it lay on the vendor to show that the disease of which the slave died might, under a different course of treatment, have been cured. 10 Martin's Rep. 215. Every thing in this case rebuts the presumption that the disease would have yielded to medi-

cine, nor do we see that there was such negligence on the part of the vendee as to deprive him of what we conceive a just and conscientious defence. As was said in the case just cited, physicians are frequently not resorted to until family medicines fail. The right of purchasers to resist the payment of an object which turns out to be of no value, should not be made to depend on their medical skill; on their knowledge that a disease on its first appearance is a dangerous one; and that recourse must be instantly had to professional men. That of which the slave died we know to be one that is slow in its progress, and not apt, in its incipient stages, to excite much alarm. The jury have found that the negro was, at the time of sale, afflicted with an *acute* dysentery. We see nothing in the evidence to support the conclusion. Taking it to be correct, it would not affect the decision of the case. Judgment affirmed.

2.

THOMPSON v. MILBURN. Aug. T. 1823. 13 Martin's Louisiana Rep. 468.

Per Cur. Porter, J. The petitioners sue to obtain the price of a slave. The defendants resist the demand, on an allegation that the negro was unsound, and afflicted with redhibitory diseases, incurable in their nature, at the time they purchased him; of which diseases he died. The sale took place in the month of August, 1819, and this action was commenced the first of November, 1820. The plaintiff contends, that the defendants cannot avail themselves of the defence set up, as twelve months have elapsed from the time of the purchase. The article of our code, which directs that the action of redhibition must be brought in one year at farthest from the date of the sale, can only receive an application in cases where the vendee is plaintiff, and *brings an action*. It leaves untouched the right to offer the want of consideration as a defence against paying the price agreed on. The rule is, "Loque tiene tiempo limitado para demandarse in juicio, es perpetuo para exceptionarse." Febrero. p. 2. lib. 3. cap. 1. sec. 6. no. 250.

Redhibitory defects in a slave may be pleaded after twelve months, in defence of an action brought for the price.

3.

CHRETIEN V. THEARD. Feb. T. 1822. 11 Martin's Louisiana Rep. 11.

In an action to obtain rescission of the sale of a slave, commenced within six months from the time of discovering the defects, the plaintiff must prove at what time he obtained a knowledge of the redhibitory vices.

Per Cur. Porter, J. This action was commenced to obtain rescission of the sale of a negro slave, called La Fortune, sold as a carpenter and joiner, for the price of \$1500. It is alleged that he is neither; and in addition, is afflicted with redhibitory defects of disposition, a drunkard, run-away, and thief. Prescription and a general denial are plead by the defendant. The district court gave judgment against the plaintiff, and he has appealed. The first question to be examined, is that which the exception, as to the time of commencing the action, presents. The slave was sold on the 3d April, 1819. This suit was commenced on the 14th February, 1820. The plaintiff replied to the plea of prescription plead by the defendant; that he brought his action within six months from the discovery of the vices and defects complained of in the petition. It has been strongly contested by the parties in this cause, on whom the burthen of proof lies, the plaintiff insisting that he cannot be required to prove a negative, viz. that he did not know of the existence of the defect anterior to a particular time; while the defendant urges, that this plea of the appellant is an exception to the general rule, which requires the action to be brought within six months from the date of the sale, and that he who relies on an exception must establish it. *Partida*, 3 tit. 14. L. 2. I have given to this subject a great deal of consideration, and my opinion is with the defendant. By our *Civil Code*, 358. art. 75. it is sufficient for the seller of a slave afflicted with redhibitory defects, to oppose the action, that it has not been commenced within six months from the sale. And on showing this fact, the plaintiff will be barred, unless he does away the objection, by replying that he did not discover the vices or defects six months before instituting suit. As he makes the averment, I think it his duty to prove it. Certainly, I do not wish to say that the buyer must give evidence that he did not know of the defect before a certain time, because that would be requiring him to prove a negative, which is impossible. But I think he should establish, when the facts came to his knowledge, on which he relies to show his right of setting aside the sale. And this he can do without difficulty; for the witnesses who prove the vices on the trial, can easily state when they communicated them to the plaintiff. If he has received the knowledge

of what the witnesses knew, and would swear through other sources, he could bring forward those who gave him this information. The moment he does this, he brings himself within the exception; and if the vendor still insists the purchaser knew of the vice at an earlier period, the burthen of proof is then thrown on him; for the buyer can do nothing more than show affirmatively, that at a certain epoch he became acquainted with the fact; he cannot prove a negative, that he did not know it sooner. The passage cited by the plaintiff from the *Curia Phillippica, Redhibitoria*, n. 26. is certainly very strong; but I cannot, alone on that authority, bring my mind to assent to the proposition, that it is the duty of the defendant to support by proof, what it behoves the plaintiff to allege.

If, in this case, the plaintiff had proved any circumstance, within six months, respecting the theft, I should have held it sufficient to have thrown the burthen of proof on the defendant, as to his knowing it sooner. But on this point the testimony is entirely defective. The slave was bought in April. There is evidence when the master returned to the Atakapas, but none as to the time the slave was sent there; of course, we have no means of ascertaining when he committed the theft, proved by one of the witnesses. All we know is, that it was after he reached his master's plantation. In regard to the defect of the qualities of carpenter and joiner, the plaintiff has proved enough to show that this action was commenced within the time required by law. But on the merits, the evidence is so contradictory, that I do not feel myself² authorised to come to a different conclusion in regard to it from the district judge. The judgment of the district court should be reversed, and, in my opinion, the justice of the case requires that there should be judgment for the defendant, as in case of a nonsuit, and that the plaintiff pay costs in both courts.

Martin, J. I cannot yield to the opinion of the author of the *Curia Phillippica*. The authorities which he cites do not support his conclusion. The defendant pleaded prescription, and the question is, who is to administer the proof of the period at which the knowledge of the redhibitory defects reached the vendee? I think we ought to require from the party who can give it. If he allege that he had it not at the time of sale, as it is clear that he had it at the time of the inception of the suit, it cannot be difficult for him, at least, to state at what intermediate period, and by what means the knowledge came to him. If he establishes any particular period—*Stabit*

presumptio donec contrarium probetur. If the adverse party does not show knowledge at an earlier period, the prescription will be supported. This repels the plaintiff's claim on the score of the slave being a thief; as to the other grounds, I think the evidence is too weak.

Mathews, J. I am of the same opinion. Judgment reversed.

4.

REYNAUD & SUCKO v. GUILLOTTE & BOISFONTAINE. May T. 1823. 13 Martin's Rep. 227.

Prescription in redhibitory actions runs from the time the defects in the slave are known to the purchaser.

Porter, J. The petition sets forth on the 24th Feb. 1821, the defendant sold to the plaintiff a negro boy named Tommy, about 23, years old, for the sum of \$900, and warranted him free from all redhibitory vices and diseases. That at the time of the sale the slave was afflicted with ulcers on his leg, and that the defendants knew it, but made false representations respecting his health; that the said ulcers are of an old standing, and that notwithstanding all the care, trouble, and expense which the petitioners have been put to, the slave is almost entirely unfit for the work and labor for which he was destined; and finally, that the use of said slave is rendered so inconvenient for them, that had they been informed of his true situation, they would not have bought him. The answer avers, that the negro at the time of the sale was not afflicted with ulcers; that if he was, the sale cannot be rescinded; and that owing to the want of care in the plaintiffs, the slave has been injured in value to the amount of \$500. With leave of the court, the plea of prescription was afterwards added.

The first question to be decided, is the plea of prescription. The action was commenced nine months and twenty-four days after the date of the sale. It is the duty of the buyer, who brings this action after six months have elapsed, to prove when the knowledge of the defects of the slave was acquired by him. A question arises out of the evidence in this case, whether the prescription runs from the time the disease was known to exist, or from the time it was ascertained to be such as would form the ground of redhibition. We think from the latter; for until the purchaser was instructed that, he had a right of action, he was not in delay by not bringing it. He cannot be accused of negligence while the nature of the disease was unknown to him, and he was conferring a benefit on the vendor by attempting to cure it. In the case of *Theard v. Chretien*, we said, that if the plaintiff had proved any circumstance respecting the time when he acquired a knowledge of the vice, we

should have held it sufficient to throw the burthen of proof on the seller, to show that he knew it earlier. In that now before us, it is proved by one of the witnesses, that the plaintiff did not seem aware that the disease was incurable in the month of October ; and up to the 31st July, the negro was not prevented by sickness from working. So that whether we take as the basis of this action the slave being afflicted with an incurable disease, or having one, which though not incurable, was known to the vendor at the time of the sale, and rendered his services so difficult and interrupted, that if the purchaser had been aware of its existence, he would not have made the acquisition. The plea of prescription must be rejected.

5.

MOORE'S ASSIGNEE v. KING et al. Aug. T. 1822. 12 Martin's Louisiana Rep. 261.

Per Cur. Martin, J. The plaintiff sues on an obligation of the defendants, assigned him by King. The principal in the obligation pleaded it was not a negotiable one ; denied having had notice of the assignment, and averred he had an equitable defence. He prayed, that the assignor might be made a party to the suit, and compelled to answer, on oath, whether the sum mentioned in the obligation, was not the price of a negro woman sold by the assignor to him ? Whether the woman had not before, and at the time of the sale, a pendulous wen, on the inside of one of her thighs, which, at times, prevented her rendering any service at all ; and whether this circumstance was disclosed at the time of the sale ? The assignor admitted, that she received the defendant's obligation as the price of a negro woman sold him, and assigned it to the plaintiff ; that the woman had, at the time of the sale, a mark on the inside of one of her thighs, which did not injure her, nor prevent her services at any time while she was owned by her ; hence this circumstance was not disclosed to the vendee, that she did not know of any pendulous wen, as stated in the answer ; but only of the aforesaid mark, which, however, she never examined.

The vendor's ignorance of a defect in the slave does not protect him in the action *quantum minoris*.

The jury found, that the sum mentioned in the obligation was the price of the negro woman named in the answer, who had a pendulous wen, as there stated, which rendered her, at times, incapable of labor ; a circumstance which was not disclosed at, or previous to the sale, and that consequently, the plaintiff ought to suffer a diminution of \$150 from the price. The plaintiff had

judgment accordingly, and appealed. Dr. Elmor deposed, that about eighteen months after the sale he examined the woman, and found she had a pendulous wen, of the size of a duck's egg, attached by a short neck to the inside of her thigh, near the left *labia pudenda*. It was said, she was laid up in consequence of an injury the wen had received while she was crossing a fence. It was wounded and ulcerated; she was relieved. He thinks the wen must have been of ancient origin, as wens do not reach the size of this in less than one or two years. The woman must have had it from her infancy. From its appearance, when the witness saw it, it must have laid up the woman from eight to ten days, and the expense of her cure could not exceed ten dollars. It must ever be subject to injury, and must incommode her in walking. The witness thinks it ought to be amputated, which would not be attended with danger, would confine her for fifteen or twenty days, and would cost about thirty dollars. Were not the witness a surgeon, he would not have given half of the price for her, on account of the wen; and as a surgeon, he thinks he would estimate the diminution in the price, occasioned by it, at \$100. Dr. Dixon having heard Dr. Elmor give his evidence, deposed, his opinion was perfectly the same, except that, as an individual, he would think the diminution of the value of the slave, occasioned by the existence of the wen, at two hundred dollars.

Marshall, the defendant's overseer, deposed, that the slave was smart and active. She was sick once or twice with the fever. He never discovered that she limped. The plaintiff's counsel contends, that as it is not proved that the vendor had any knowledge of the existence of the wen, no diminution of the price ought to have to have been made. Civil Code 360. art. 80. The ignorance of the vendor protects him, indeed, against redhibitory action; but it is that action alone of which the *code* speaks, in the part quoted. This ignorance will not avail in the action *quantum minoris*. "If the seller was ignorant of the defect, then the buyer must keep the slave, and the seller restore so much of the price as the value is diminished by reason of the defect;" and so, we say, if the slave was afflicted with any hidden disease. Part 5. 3. 64. Judgment affirmed.

6.

ST. REMES v. PORE. May T. 1821. 10 Martin's Louisiana Rep. 30.

Martin, J. This is an action for the rescission of the sale of a negro woman, on the ground that she was attacked with the malady of which she died soon after the sale, previous, and at the time of the contract. The defence is, that the defendant, *finding that the woman was sick*, had her sold at auction, on the 2d of May, when she was struck to the plaintiff. That soon after the plaintiff informed him he would not take the woman, as she was sick; to which the defendant replied, he thought he was bound to take her, as she had, according to the defendant's orders, been sold, with the only warranty of the redhibitory diseases; that on the 9th the plaintiff informed him he would accept the sale, and the defendant executed the bill of sale for her to the plaintiff before a notary public. There was judgment for the plaintiff, and the defendant appealed. The defendant, by interrogatories, drew the following facts from the plaintiff: The plaintiff after the auction, and before the execution of the sale before the notary, told the defendant he would not take the wench, as he had discovered that she was sick. To which the defendant replied, *he did not know whether she was*; but that, at all events, he meant to sell, and had actually sold her as he had bought her, i. e. with a warranty of all redhibitory diseases. To the best of the plaintiff's recollection, of the correctness of which he declared himself sure, the defendant did not say, that unless the plaintiff could prove that the woman's disease was a redhibitory one, he could not help taking her, as those only were warranted against. Some days after, and in consequence of the defendant's declarations, the parties met at the notary's office, and executed the act of sale. The statement of facts shows, that Dr. Dow deposed, that he was called upon to see the woman, just after the defendant bought her, and recognized her as a patient whom he had visited at her former mistress's seven months before; at that time she labored under an intermittent fever, occasioned by a suppression of the menstrual discharge; he ordered the ordinary remedies: wine, bark, and a generous diet, with exercise. When he saw her at the defendant's he found her weak, her legs swollen, and told him a generous diet and proper medicines would effect her cure. And as he did not consider her as incurable, and as she was a valuable servant, he advised him to have her well attended. He has not seen her since. Dr. Dupuy said he was

If the disease was curable in its origin, but incurable at the time of the sale, the case is a redhibitory one.

called upon by the plaintiff, to the woman ; she appeared very sick, and he supposed her incurable. He attended her from the 17th of May, 1818, till the 13th June, when she died. On the second day of his attendance, she was in a state of complete *marasme*, with all the symptoms of a chronic disease, in its last stage ; her legs swollen. He attended her carefully, but, as he had supposed, to no purpose. The disease he believes was of seven or eight months' standing, and quite incurable when he saw her. Giguel, the plaintiff's brother-in-law, deposed, he knew the woman, who had before been his property. The defendant applied to him before he bought her, and he told him she was a good servant. He did not know her to be sick before she died at his house on the 13th of June ; the plaintiff having put her there.

It is contended, that the plaintiff cannot recover, as the sickness of the slave was known to him at the time of the execution of the act of sale. It is not easy to conclude, from the evidence in the case, that he knew the disease was an incurable one ; and he had the plaintiff's assurance, that if it was a *redhibitory* one, it was warranted against ; so that our sole inquiry is, was the disease a redhibitory one ? Ailments or infirmities constitute redhibitory defects, when they are incurable by their nature. So that the slave subject thereto, is absolutely unfit for the services for which he is destined ; or these services are so inconvenient, difficult, and interrupted, that it is to be presumed the buyer would not have bought her at all, if he had been acquainted with the defect ; or that he would not have given so high a price, had he known that such a slave was subject to that sickness, or infirmity. Civ. Code. 358. art. 80. I understand this to mean, if the buyer knows the nature of the disease, i. e. that it is incurable. In the present case, the disease existed before the sale, and though curable in its origin, had now become incurable. This certainly was not known to the plaintiff ; for who can believe, that if it was, he would have bought ? He knew the slave to be sick, informed the vendor of it, and received for answer, that she was sold with a warranty of redhibitory diseases ; among these, the law has classed incurable ones, such as that under which the slave labored. It appears to me, the parties contemplated that the vendee's claim would depend on the issue of the disease. I think we ought to affirm the judgment of the parish court.

Mathews, J. I concur in this opinion, for the reasons therein expressed. Judgment affirmed.

7.

HEPP v. PARKER. Jan. T. 1830. 20 Martin's Rep. 473.

Per Cur. Porter, J. This is a redhibitory action, in which there was judgment in the court of the first instance in favor of the plaintiff. The defendant appealed. The cause was submitted to a jury, and on the trial, the appellant took two bills of exceptions. One of them was to the opinion of the court preventing a witness answering the following question: "How many days before the plaintiff signed the bill of sale was it that he came and perused the bill of sale, as written in the records of G. R. Stringer, Esq., notary public?" We think the judge erred. The answer to the question could not, in any respect, contradict the act, not even its date; for *non constat*, whether the date was affixed when the instrument was drawn out, or at the time it became a public act by the signatures of the parties.

Knowledge in a purchaser, that a slave is diseased, will not defeat his action of redhibition: it must be shown he knew the disease was incurable, or, that without knowing that, he bought the chance of the slave's recovery.

The object, declared in the bill of exceptions of putting this question, was to show that the plaintiff had the slave in possession, and was acquainted with him before he signed the bill of sale. The appellee urges, that if this were the object, it could not have, in any respect, weakened his case, or strengthened his adversary's, supposing the witness to have answered as the party calling expected. Because, whether the plaintiff knew of the fact or not, at the time of the purchase, he is still protected under the warranty. To this objection it has been answered, that the disease of which the slave died, was one of those which the law classes as an *absolute vice* of body; that consequently, the action can only be maintained under the 2496th article of the code, which confers it on the buyer, when the thing bought is either absolutely useless, or its use is so inconvenient and imperfect, that it must be supposed the buyer would not have purchased it, *had he known* of the vice; and that if the answer to the interrogatory would have induced the belief of the purchaser having a knowledge of the disease at the time he bought, then it was material it should be answered, because the presumption of ignorance, on which the law gives an action, would be destroyed. This argument has also been supported, by reference to the 2497th article of the code, which declares, that *apparent* objects, such as the buyer might have discerned by simple inspection, are not among the number of redhibitory vices. Knowledge that a slave was diseased at the time of the sale, and a knowledge that he was afflicted with an incurable disease, are two distinct things, and their effects on the right of the parties quite dissimilar.

It is almost incredible, that any person in his senses would buy property of this kind, and give a full price for it, unless he conceived he was protected by the warranty, and even then it is difficult to conceive any object in such a contract. If, indeed, as was said in the case of *St. Romes and Porè*, it appeared clearly, that the purchaser knew the nature and extent of the disease, and consented to purchase under all risks, the action of redhibition could not, perhaps, be maintained. But when the evidence is in the least degree equivocal, the presumption would be, that where a full price was given, the purchaser conceived the disease was other than incurable; one that would yield to medicine. It is established in the present instance, that the slave died of an abscess in his lungs. When the physician was first called in, which was seven or eight days after the date of the bill of sale, the negro was found to be afflicted with a cough, and difficulty of breathing. This cough existed at the time the contract was made, for it is in evidence that the defendant, when questioned in relation to it by the plaintiff, said, it was the remains of dysentery. Now, supposing the witness had established the fact of the plaintiff's having the slave in his possession some time before he signed the note, we do not see how it could have aided his defence. The presumption flowing from it would only have confirmed a fact proved by other testimony, and in relation to which there does not appear to have been any dispute; namely, that the plaintiff knew at the time he purchased the slave he was afflicted with a cough. We are clear this knowledge did not defeat his recourse in warranty, for there must not only be knowledge of a disease, but knowledge of one that is incurable, and of such a nature as to render the slave useless, or his use so inconvenient and imperfect, that the buyer bought under the hope or chance he might recover. 10 Martin's Rep. 220. Although, therefore, the judge might very properly have admitted the evidence, we do not see any possible influence it could have had in the cause which would authorize us to remand it for a new trial. Judgment affirmed.

8.

BROWNSTON v. CROPPER. Spring T. 1822. 1 Little's Rep. 173.

The same principle adopted in Kentucky.

Brownston filed a bill against Cropper, alleging he purchased a negro of him, and she died in 16 days after; that she had been sick of an inveterate and chronic disease from the hour of her sale, and that he had discovered she was laboring under the same disease long

before the sale, to the knowledge of Cropper, who represented her to be sound and healthy, which induced him to purchase her. It appeared that the slave told Brownston at the time of the sale, that she was mortally sick, and could be of no service to him. The court held, that where the seller of a slave, represented her to be in good health, notwithstanding the slave should state her true situation, it would not be notice to him so as to discharge the seller from his responsibility for the misrepresentation, there being a strong indisposition in slaves to be sold, and they by stratagem to avoid a sale, may frequently feign sickness, and the purchaser may well disbelieve them, and rely on the word of the seller. The constitutional court of South Carolina decided directly the reverse. They held that in an action for a breach of warranty of soundness, the declarations of the slave in relation to the disease were admissible. 1 Harper's Rep. 39.

9.

SMITH v. ROWZEE. Spring T. 1821. 3 Marshall's Rep. 527.

Rowzee sold a negro girl to Smith. The contract was made at Smith's house, he never having seen the girl. The next evening the girl was sent to Smith's house, from which place she was immediately taken by Bishop, who had purchased her of Smith, to his own house, about eight miles distant. He was obliged to stop with her several times on the road, and finally was compelled to leave her at a neighboring house. She was immediately taken back to Smith's house, and the contract between Smith and Bishop rescinded. The girl remained at Smith's house, under the care of physicians, when she died. And Rowzee sued Bishop for the price agreed upon at the time of the sale. Verdict for the plaintiff. The defendant appealed.

Per Cur. Mills, J. The plaintiff was no doubt acquainted with the debilitated state of the slave when he sold her. She had just recovered from a fit of sickness, and the plaintiff sent her to the house of the defendant veiled, to conceal the loss of part of her hair by fever. He said nothing about her sick or dangerous state. If he concealed these things, he was guilty of concealing the truth, which absolved the appellant from all obligations to pay for her, or

But if on the sale of a slave her state of health is concealed or misrepresented, the purchaser is absolved from the contract.

if he gave a coloring to the facts relative to her condition, he was guilty of a misrepresentation.* Judgment reversed.

10.

EXECUTORS OF HART v. EDWARDS. May T. 1831. 2 Bailey's Rep. 306.

And there is no implied warranty from the price, where the purchaser is acquainted with the defects.

Assumpsit on a promissory note, given for a slave.

At the sale, the slave looked very ill, and the auctioneer gave notice, that "he had had the venereal, but was well, or nearly well." The defendant gave \$460.; and if he had been entirely well, would have been worth \$30 or \$40 more. The slave died seven days after the sale. Verdict for plaintiff. Motion for a new trial, on the ground that there was an implied warranty arising from the price.

Per Cur. Johnson, J. The defendant had notice, at the time he purchased the slave, that he was diseased; and the evidence shows, satisfactorily, that his death was the consequence of that disease, or its incidents. And if he thought proper to purchase, without a warranty against its consequences, he was bound by it. Motion denied.

* An express warranty excludes a prior one. *Lamier v. Auld*, 1 Murphy's Rep. 138. And no particular form of expression is required to make an express warranty. *Osgood v. Lewis*, 2 Har. & Gill's Rep. 495.; *Bacon v. Brown*, 3 Bibb's Rep. 35. And the jury are the proper judges whether the words amount to an express warranty or not. *Ibid.* *Duffee v. Mason*, 8 Cowen's Rep. 25. *Borrekens v. Bevans*, 3 Rawle's Rep. 32. *Jackson v. Wetherell*, 7 Serg. & Rawle's Rep. 480. There can be then no definite rule laid down as to what shall constitute an express warranty. As where the seller said, on the sale of a mare, she was safe, gentle, and kind, in harness, the court held it a representation, and not a warranty. *Jackson v. Wetherell*, 7 Serg. & Rawle's Rep. 480.; but where the seller said of a negro woman slave, that "she was of sound wind and limb, and free from all disease," the court held, that it was a warranty of the soundness of the slave. *Cramer v. Bradshaw*, 10 Johns Rep. 434. And where the seller of a colt said, "there is nothing the matter with the colt; it is well and sound, and will make a fine horse," the court said it might amount to a warranty, or it might be matter of opinion; and the jury must judge from all the circumstances of the case, and how the words were understood by the parties. *Duffee v. Mason*, 8 Cowen's Rep. 25.; *Osgood et al. v. Lewis*, 2 Har. & Gill's Rep. 495.; *Borrekens v. Bevans et al.*, 3 Rawle's Rep. 23. And the rule seems to be, that in an express warranty of a chattel, it is immaterial whether the party making it knew it to be false or not. *Watts v. Mattingly*, 1 Bibb's Rep. 244.

11.

DAVIS v. SANDFORD. Spring T. 1815. 6 Little's Rep. 206.

The appellant sold to the appellee a slave. The deed of bargain and sale contained a warranty that the negro was born a slave. It appeared the negro had been in the state of Ohio, and had, by the courts of that state, been declared free, which fact was known to both parties. The seller alleging, that judgment declaring the slave free, had no force or effect upon his rights, as he was not made a party.

Or even of title where the purchaser knows the seller acts as broker.

The court, Ch. J. Boyle, held, that the warranty was not broken; it not being alleged or proved, that the negro was not born a slave; and the justice of the case is with the seller, the buyer purchasing with a knowledge of all the facts, which was properly shown by parol evidence.

12.

OTTO'S SYNDICS v. DAVID. January T. 1836. 9 Louisiana Rep. 59.

This was an action to recover the price of a slave sold.

This sale took place in the afternoon of the 22d January, 1834, and was of a woman called Madeleine, for \$960, adjudicated to the plaintiff as the property of the insolvent. It appeared that Madeleine fell sick of the cholera, on the 24th of January, the day after she was delivered to the defendant, and regular medical aid was administered; but she died on the 25th of the same month.

The district judge decided, that a rescision of the sale must take place; the presumption being, that the disease existed at the time of the sale.

On appeal, the court ordered, that the sale of the slave Madeleine be rescinded and annulled, observing, that it has been contended in argument, that the cholera, the malady of which this slave died, is not an incurable disease in its first stages. The court is of a different opinion; it considers the malady incurable, so far as to authorize the redhibitory action, when it baffles the efforts of regular medical aid, and death ensues, notwithstanding this aid is promptly administered. In this respect the judgment in the first instance, is correct, and the redhibitory action is sustained.

A malady will be considered as incurable, so as to authorize the redhibitory action and rescision of the sale, when it baffles the efforts of medical aid, and death ensues within three days.

13.

HAWKINS v. BROWN et al. Oct. T. 1834. 7 Louisiana Rep. 417. 6 Martin's Rep. 539. N. S.

Parol evidence is admissible to prove the declarations of a vendor in relation to the redhibitory vices of slaves at or before the sale, but not the declaration of strangers

The action was brought on two promissory notes. The notes were given as part of the price of two negroes. The slaves belonged to Thomas Gimball's succession, and were sold at auction. The crier stated that one of them was not sound, and from conversation with others, the defendants knew of the redhibitory vices of the slaves. The other slave was a runaway, and great thief. Verdict for plaintiff. The defendants appealed.

It was contended, that testimonial proof could not be received to contradict the *procès verbal*, or written sale of the slaves. There is no mention made of the redhibitory defects being declared by the seller or auctioneer, in the *procès verbal* of this sale, which must be conclusive on this point.

Per Cur. Martin, J. The Louisiana code, art. 2498., provides that the vendee cannot urge redhibitory vices which were made known to him by the vendor, at or before the time of sale; and authorizes parol evidence of these declarations.

But we are compelled to say, that no declarations made by a stranger can have the same effect. The conversation of by-standers with either of the defendants were, in the opinion of the court, improperly admitted to exclude the legal warranty relied on, and the benefit of which is claimed by the defendants, unless they tended to establish the fact that the redhibitory vices complained of, had been declared by the vendor to the defendants. Judgment reversed.

14.

HANKS v. M'KEE. Fall T. 1822. 2 Little's Rep. 229.

Disguising or misrepresenting the violence or extent of a disease renders the sale void.

The appellant, in his declaration averred, that the appellee sold him a slave for \$400, and represented the slave to be sound and healthy, except the phthisic, and she had it lightly, and it would not do her any injury, knowing at the same time his representations were false, and that she was laboring under the last stage of the disease, and that she died shortly after the sale.

It appeared the wench was purchased at the house of the appellant. The appellee stated the wench was 19 years of age, middling stature, large enough for any business, and was healthy, except she had the phthisic, and on these representations the appellant was induced to take the slave. He sent a messenger for the slave,

and the appellee not having yet arrived, the messenger returned without her. Two days after, he sent the messenger, who returned with the slave, who was sick and unable to walk, and died at his house within three weeks after. The court instructed the jury, "that it was the duty of the plaintiff, now appellant, to have used due diligence in discovering any defect which might belong to the negro." Verdict for defendant.

Per Cur. That every person purchasing an article or commodity, which may be defective, may be bound to espy out any visible defect, easy to be discovered, when the article is examined, and that the seller may not be responsible for such defects, will not be contested. But even then, if the seller uses any artifice, or disguises such defects, or misrepresents them, or by false statements induces the purchaser to waive the defect, and make the purchase, the defect notwithstanding, the seller may be made responsible. But the phthisic or asthma is not a disease of that palpable character, that a person is bound to notice it, certainly not the stage the disease has progressed. If the seller misrepresented even the violence of the disease, so as to induce the purchaser to buy, he is responsible. Judgment reversed.

15.

GALBRATH v. WHYTE. April T. 1797. Haywood's Rep. 535.

Per Cur. *Caveat emptor* applies, where a man purchases an article of personal property not in the vendor's possession. He ought, in such case, to require a warranty; the not being in possession, gives reason to doubt. Another case is, where the thing sold has some visible quality which lessens its value. Where it has a quality lessening its value, which is not discoverable by ordinary inspection, it is otherwise. In such case, there is no need of any express warranty. Every man is bound to be honest. He ought to discover to the vendee, all such properties as, if known, might probably dispose him not to purchase. If a man sell an unsound horse, whose disorder is not known, and receives full value, as for a sound horse, an action lies against the vendor; and that action may be assumpsit, stating the sale, and that the vendor undertook to prove the horse was sound. See *Thompson v. Tate*, 1 *Murphy's Rep.* 97.; *Sheber v. Robinson et al.*, 2 *Murphy's Rep.* 33.; *Gilchrist v. Morrow*, 2 *Car. L. Rep.* 607.; *Erwin v. Maxwell*, 3 *Murphy's Rep.* 241.; *Ayres v. Parks*, 3 *Hawks' Rep.* 59. And so, also, where a sale is made by sample. Boorman and

So, also, omitting to disclose defects not discernible.

Johnson v. Jenkins, 12 Wend. Rep. 566. ; Beebee v. Robert, 12 Wend. Rep. 413. ; Andrews v. Kneeland, 6 Cowen's Rep. 354.

16.

TEXADA v. CAMP. June T. 1824. Walker's Mississippi Rep. 150.

If A. sells with warranty an unsound slave to B., in an action by B. against A. on the warranty, it is no defence to an action that before its institution B. sold the same slave to a third person, and that no recovery had been had against B.

Per Cur. Ellis, J. Trespass on the case, on a warranty for the soundness of a negro woman sold by Texada to Camp. Plea not guilty. When this case was heard, the plaintiff produced a bill of sale from defendant to plaintiff, which warrants the title, as well as the health of the negro woman Malind, for and in consideration of the sum of \$475. It was also proved, that Camp had sold the negro for \$325 to one White ; but said negro, soon after the sale to White, and before the institution of this suit, died with the venereal disease. Upon this evidence the defendant's counsel moved the court to instruct the jury, 1st. That if they should be of opinion, from the evidence, that the plaintiff ought to recover, that then the measure of damages should be the difference between the real value of the slave at the time of sale and warranty, and what would have been her value at that time, if sound. 2d. That if plaintiff, had sold said slave, which appeared from the evidence, he could not recover from the defendant, unless a recovery had been had against him. But the court overruled the motion, and charged the jury expressly, that if they found by the evidence, that the slave in question was worthless, and had at the time of the sale the disease of which she died, that the measure of damages should be the sum paid for the negro by Camp, without saying any thing about interest, leaving that matter entirely discretionary with the jury. To which opinion the counsel excepts, &c.

The only question raised by the assignment of errors, is as to the measure of damages. The general rule upon this subject cannot be mistaken. In trover, it would be the value of the property at the time of conversion ; but according to better and later decisions, the rule has been extended. As for instance, in trover for money in a bag, the measure of damages would be the amount of the sum, with interest, from the time of conversion. So, in a similar action for a slave, the jury would be instructed to give the value of property at the time of conversion, with its yearly value from the same period, up to the rendition of the judgment of the court. See the case of Thomas Hinds v. William Terry, referred from Jefferson county, where these principles are clearly established. 14 Johns. Rep. 122. In the case before us, Texada

sold a negro to Camp for \$475, and on the 29th of September, 1821, warranted her to be sound in body and mind. According to the finding of the jury, she was worthless, and unsound, on the day of warranty, and I think the judge instructed the jury correctly, and might with propriety have gone further, and charged them to have found a full verdict, with interest from the day of the date of the warranty, as I am fully persuaded the defence sought to be maintained by the defendant, cannot be supported by the rules and principles of the law.

Will the vices and illegalities of a contract between Camp and White, be a matter of good defence by Texada in the present case, on a separte and distinct contract? I presume not. As if A. receives money to the use of B. on an illegal contract between B. and C., he shall not be allowed to set up the illegality of the contract, as a defence in an action brought against him for the money of B. See the case of *Levant v. Elliott*, in 1 Bos. & Pull. So, in this case, Texada shall not be allowed to set up the illegal contract of Camp and White, as a matter of defence before the court and jury, because he has received a full price for his negro upon the warranty; and by that alone he must be answerable, it being the contract upon which this action is founded. I will not deny but that Camp will be liable to White, whenever he may think proper to establish his claim, but that a party to a suit at law, can travel out of the express terms of his contract, by which his liability has been created, when the jury have said the property warranted was not worth one cent, is claiming too great an indulgence at the hands of the court. Let the judgment of the court below be affirmed. Judgment against the principal and security.

17.

MILLAR v. COFFMAN. March T. 1829. 19 Martin's Louisiana Rep. 556. *S. P. LAWRENCE v. M'FARLANE*, 19 Martin's Rep. 558.

Per Cur. Porter, J. The question which this case presents is, whether the buyer of a slave afflicted with a disease which was curable in its nature, and cured, has an action on reduction of the price. The services of the slave were lost to the purchaser for about sixty days. The court below thought he has not, and gave judgment for the defendant. The plaintiff appealed. The judge,

The causes for which a reduction in the price of a slave can be claimed are the same as those for which the recision of the sale may be demanded.

under the 2522d article of the *Louisiana Code*, assimilated the claim for a reduction in the price to the action for redhibition, and concluded that, as in the latter action, the contract could not be set aside, unless the slave was afflicted with some vice or defect which rendered him absolutely useless, or his use so inconvenient or imperfect that it must be supposed the buyer would not have purchased him had he known of his imperfections; the plaintiff could not demand any reduction for a defect which did not fall within either of the causes that furnish ground for redhibition. We think the judge did not err. The article 2522, in our opinion, places the causes for the reduction of price on the same ground as those of redhibition, and we are unable to say, from a consideration of the proof offered in this instance, that had the plaintiff been informed of the disease under which the slave labored, he would not have purchased him. Judgment affirmed, with costs.

18.

DESDANES v. MILLER. Jan. T. 1824. 14 Martin's Louisiana Rep. 53.

When a jury find that a slave who has subsequently died, had a consumption, at and before the time of sale and transfer thereof, the court below may fairly presume that the disease was incurable.

Per Cur. Mathews, J. This suit is brought to recover the value of a certain female slave, described in the petition, on account of a redhibitory disease with which she is stated to have been afflicted at, and before the time of sale and delivery to the plaintiff. The answer of the defendant denies the right of the plaintiff to proceed directly against him, alleging that he is only surety in the warranty expressed in the act of sale, and not principal. It contains also a general denial, and a prayer for a jury. The cause was submitted to a jury in the court below, who found a special verdict, on which judgment was rendered for the plaintiff, and the defendant appealed. The jury find that the slave in question, had the consumption at and before the time of the sale and transfer to the plaintiff, and that she died of that disease. This finding, the defendant insists, does not support the judgment thereon rendered, because the jury have not found that the disease was incurable in its nature. But as the jury do not negative the fact of its incurability, this, from their finding, and other evidence in the case, may have been fairly intended by the judge. Judgment affirmed.

19.

PRICE v. BARR. Spring T. 1816. 6 Little's Rep. 216.

The plaintiff declared, that the defendant, by a certain writing, did sell to the plaintiff a certain negro boy for \$400, and did then and there, by the said writing, warrant the said negro boy to be sound; which said negro boy was then and there, at the time of the said sale and warranty unsound.

The court charged the jury, that if the slave was unsound at the delivery, it was unimportant whether he was sound or unsound at the time of the sale.

A warranty of soundness means that the thing warranted is sound at the time of the sale, not that it shall continue sound thereafter.

Per Cur. Boyle, Ch. J. The court below erred in their instructions to the jury. The court seems to predicate their opinion upon the fact, that the delivery of the boy, by the defendant to the plaintiff, did not take place until some time after the contract was made. This will not justify the opinion of the court. A contract of sale, transfers the property in the thing sold, from the seller to the purchaser, without delivery, insomuch, that an action of detinue may be maintained by the latter against the former, for a detention of the sale. 1 Chitty's Pl. 118. And if a future time be agreed upon for the delivery, the thing sold is at the risk of the purchaser, until the time of delivery, unless otherwise stipulated between the parties. 2 Black. Com. 452.; Shep. Touch, 224. The seller may, indeed, bind himself by contract, to warrant the thing sold shall continue sound after the sale; but in this case the defendant is alleged to have warranted the boy sound, and not that he should be so thereafter.

20.

TIMROD v. SHOOLBREAD, 1 Bay's Rep. 324.; LESTER v. EX'RS. OF GRAHAM, 1 Const. Rep. 183.; MITCHELL v. DUBOIS, 1 Const. Rep. 360.; ROUPLE v. M'CARTY, 1 Bay's Rep. 480.

Assumpsit for the value of a family of negroes, sold at auction for one hundred and seventy pounds. One of the negroes died the next day of the small pox, and consequently must have been infected before the sale. The plaintiff did not know the negroes were infected.

The law implies a warranty of soundness in a slave in South Carolina sold for a full price.

Per Cur. Burke and Bay, J. In every contract all imaginable fairness ought to be observed, especially in the sale of negroes, which are a valuable species of property in this country. It has been decided often in our courts, that selling for a sound price

raises in law, a warranty of the soundness of the thing sold, and if it turns out otherwise, it is a good ground for the action of assumpsit, to recover back the money paid. Powell on Cont, p. 150. This warranty extends to all faults known and unknown to the seller. Verdict for the plaintiff, deducting the value of the dead negro at the time of sale.

21.

TRIBBLE V. OLDHAM. Dec. T. 1830. 5 J. J. Marshall's Rep. 139.

It is a contract.

Held by the court, that a warranty of soundness in a bill of sale of a slave, is an executory contract. It is a contract to do some duty. A duty results from it; and this obligation is not merely implied—it is express. The warranty, is a guarantee or assurance of indemnity. It is a stipulation, and a contract to do some act. Hamilton v. Wagner, 2 Marshall's Rep. 331.

22.

DITTO V. HELMS et al., Spring T. 1829. 2 J. J. Marshall's Rep. 129.

THE ONEIDA MANUFACTURING SOCIETY V. LAWRENCE, 4 Cowen's Rep. 440.; WHITNEY V. SUTTON, 11 Wend. Rep. 441.; DUFFEE V. MASON, 8 Cowen's Rep. 25.

No particular form of words are necessary to a warranty.

Action on a warranty on the sale of a negro girl, in the following words: "The said Helms and Shackelford do forever warrant and defend the title of the said negro, from all persons whatever, claiming or to claim her;" and likewise state, that "we have sold her to said Ditto as a sound and healthy negro."

The question was, whether the writing amounted to a warranty, or was only an affirmation of the condition of the slave.

Per Cur. Robertson, Ch. J. We think it amounts to a warranty. No described form of words is necessary to constitute a warranty. Any words will be sufficient which will show that it was the intention of the parties that there should be a warranty.

23.

BEAL'S HEIRS V. DE GRUY. June T. 1831. 2 Louisiana Rep. 468.

Redhibitory defects should be solved principally by the circumstances of each

The plaintiff, under an order of the court of probates, sold at auction two slaves to the defendant for \$1160. And this suit was brought to compel the defendant to comply with the terms of sale.

The answer alleged, that one of the slaves was afflicted with an incurable disease. The testimony of the physician was, that the slave

was afflicted with *Farices*, and that it had been of long standing, and the value of the slave was diminished one third. The court gave judgment for the reduction of price, and the defendant appealed.

case; and unless the thing sold is absolutely or does, it is the duty of courts to make a fair deduction of price, and not void the sale.

Per Cur. Mathews, J. In support of the plaintiff's right to obtain judgment, his counsel relies on the art. 2496 of the Louisiana Code, and a decision found in 8 Martin's Rep. 313. That decision was made under an article in the old code similar to that cited from the new. It appears to be difficult to reduce the doctrine of redhibition to any precise and explicit rules, calculated to answer the ends of justice in every case which may arise. Questions relating to redhibitory vices and defects in things sold, must be solved principally in relation to the peculiar facts and circumstances of each particular case. With regard to the bodily defects and vices of slaves, our law divides them into two classes: one denominated absolute, and the other relative. The former in all cases afford a legal ground of redhibition; the latter may also furnish a good cause for an entire rescision of the contract of sale, or a reduction of price, according to the facts of each particular case. In the present suit, there is no evidence that shows the disease of the slave alleged to be defective, to be of the class defined as absolute. A physician, the only witness examined in relation to it, who was called by the vendee, declares his opinion, that it is not incurable; but that from its nature, so long as it endures, interruptions to the services of the slave afflicted, would be a necessary consequence; that it appeared to him, to have been of considerable duration; and from this circumstance, difficult of cure. He concludes the slave in question to be worth one third less in consequence of the diseased state, than she would be if sound. The disease appears to be an enlargement of the veins in one of her legs.

On this testimony we are obliged to determine, whether or not the disease proven, constitutes a redhibitory defect.

The article of the code cited, (2496) defines "redhibition to be the avoidance of sale, on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect that it must be supposed the buyer would not have purchased it had he known of the vice." The article 2497 declares, that "apparent defects, that is, such as the buyer might have discovered by simple inspection, are not among the number of redhibitory vices." The true meaning of this article is not very perspicuous: that is, whether the defect should be

open and apparent to the buyer by a view of the object offered for sale in the manner which it is exhibited to his sight, or whether he is not bound to inspect and examine it with the care and caution ordinarily used by prudent men on such occasions.

It is, however, unnecessary to give any interpretations to it in the present case, in consequence of the conclusion to which the article 2501 necessarily leads us. There is a clause in this article, which we believe did not exist in the old code, that seems to control, in a great degree, that part of the article (2496) relative to the inconvenience and imperfection of the use of things purchased.

After the distinction of bodily defects or vices in slaves into absolute and relative, it is declared, that the former are those of which the bare existence give rise to the redhibitory action. But "relative vices are those which give rise to it, only in proportion to the degree in which they disable the object sold." From this we conclude, that unless the object sold be absolutely useless, it is rather the duty of courts of justice to make a fair deduction from the price, than entirely to avoid the sale, especially, when the real value of the thing bears any reasonable proportion to the price agreed upon. The diminution of value, in consequence of the disease of the slave, in the present instance, is estimated by the defendant's witness at one third less than the price stipulated; and we perceive nothing, in the whole testimony of the cause, which requires our interference, in relation to the conclusion of the court below, on the relative value of the two slaves purchased by the defendant.

24.

M'FARLANE v. MOORE. Sept. T. 1805. 1 Overton's Rep .174.
2 Bay's Rep. 17.

The defect
must be
material.

Action upon the case in the nature of a deceit. M'Farlane purchased of the defendant a negro woman for a full price, and took a bill of sale. The declaration averred, that the slave had been in a sickly state for some time, and that the defendant knew of her sickness. A physician stated that he thought her incurable, in consequence of the improper use of mercury, and that she died soon after the sale. Verdict for the plaintiff. Rule for a new trial.

Per Cur. Overton, J. The questions for the consideration of the jury were, First. Was there a defect in the property sold? Second-

ly. If a defect existed, was it a material one? Thirdly. Did the defendant know of the defect before the sale? They found all these facts in favor of the plaintiff, and have assessed damages to the value of the negro. It has been objected, that parol proof has been improperly received; that the whole extent of the contract is embraced by the bill of sale; and nothing can be implied or presumed; but *suggestio falsi* and *suppressio veri* are sufficient to invalidate a contract on the ground of fraud. And the reception of evidence to show the soundness or unsoundness of the woman, at the time of the sale, does not contradict or vary the bill of sale.

25.

SMITH V. MILLER. Fall T. 1812. 2 Bibb's Rep. 616.

The appellee sold to the appellant, a negro boy, evidenced by writing, in these words: "Rec'd of Wm. Smith, of Lexington, \$300 for a negro boy named Abram, which negro is sound and healthy, and I warrant the title of said boy against the claim or claims of every person whatever, as witness my hand this 26th of March, 1810." The appellant moved the court to instruct the jury, that if they were of opinion that the defendant sold the negro in the declaration mentioned to the appellant, with a warranty of his soundness, that the negro, at the time of the sale and warranty, was unsound, and of which unsoundness he afterwards died, that the appellant had a right to recover such damages as they should think he was entitled to from the evidence. The court refused to give the instruction, and the appellant appealed.

Where there is no express warranty it must be averred that the defendant knew of the unsoundness.

Per Cur. Owen, J. This bill of sale, which affirms that the negro is sound, does not amount to an express warranty of soundness. That the appellee did not intend to warrant the negro sound, we think evident from the writing. It contains an acknowledgment of the receipt of the money for which the negro was sold; a representation that he was sound, and an express warranty of title. Had the appellee intended to warrant the negro sound, it is most reasonable to suppose the warranty would have been so worded as to embrace it. Where there is no express warranty, but only an affirmation of soundness at the time of sale, in an action for a false affirmation, the declaration should charge that the vendor knew the article was unsound. Here there is no such averment; and having declared on the warranty of soundness, when there is none, the judgment of the circuit court must be affirmed.

26.

LEWIS v. COOPER. Feb. T. 1814. 1 Cook's Rep. 467.

Extent of
a warranty
as to their
crease.

The court left the question undecided, whether the warranty of title of a negro woman, would extend to the increase.

27.

GLASSCOCK v. WELLS. 1813. 1 Cook's Rep. 262.; S. P.

BALDWIN v. WEST, Hard. Rep. 50.

Generally.

The court held, that, upon a warranty, the vendor is liable for defects not known at the time of the sale : but he is not liable for unknown defects if he make no warranty.

28.

WATERS v. MATTINGLY. Fall T. 1808. 1 Bibb's Rep. 244.

And the
same rule
applies to
any other
chattel.

The defendant sold the plaintiff a horse, and warranted him sound. It was proved that the horse was unsound, immediately after he came into the possession of the plaintiff. The court, Edwards, Ch. J, held, that where there was an express representation, which turns out untrue, it is immaterial whether the party making it knew it to be false, or not. Bibb. Prather de Pr. Dec. 153. ; Pile v. Shannon, Har. 55. ; Ferrin v. Taylor, 3 Cranch, 270.

The same principle was decided by Judge Cranch, in Stewart v. Johnson, June T. 1820, circuit court U. S., Washington, (MS.)

29.

HANCOCK v. SHIP. Spring T. 1829. 1 J. J. Marshall's Rep. 437.

Suit on.

Per Cur. Robertson, Ch. J. The objection to the declaration is not valid. Although a written warranty be given, an action on the case may be sustained for fraud in the warranty. Such suits are not unusual. They are sustained by authority and principle. For the simple warranty suit must be brought "*ex contractu*," and of course must be covenant, if the warranty be in writing. But whether it be written or parol, suit for a fraud in making it, should be case *ex delicto*.

(B.) OF THE WARRANTY OF MORAL QUALITIES.

1.

XENES v. TAQUINTO et al. April T. 1829. 19 Martin's
Louisiana Rep. 678.

Per Cur. This is an action of redhibition to annul the sale of a slave, and recover part of the price for her, and to be exonerated from the payment of the balance due. The general issue was pleaded in the court of the first instance, and the defendant's vendor cited in warranty. The cause was submitted to a jury who found for the plaintiff. Judgment was rendered on this verdict against the defendant, and in his favor against Shift, from whom he had purchased. From this judgment, both the defendants and the party called in warranty, have appealed. The vice, to which the slave is charged in the petition to be subject, is habitual drunkenness. The evidence establishes satisfactorily the allegation. The only question, therefore, presented for our decision, is, whether the defect be such a one as authorizes the purchaser of a slave to it, to have the sale rescinded.

Drunkenness is a mental, not a physical defect, and is not a ground of redhibition.

The purchase was made since the enactment of the late amendments to our code, and must be governed by them. The 2496th article of that work defines redhibition to be, "the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed the buyer would not have purchased it had he known of the vice."

The 2500th article divides the defects of slaves into two classes: vices of body, and vices of character. In the 2502d, some of the vices of the body are defined, and others are stated to be contained in the 2496th article, which we have already cited. But with regard to those of character, the next article expressly declares, that they *are confined* to cases where the slave has committed a capital crime, where he is convicted of theft, and where he is in the habit of running away. No reference is made, as in the article relating to their bodily defects, to the previous provision which makes any disease a cause of redhibition, which renders the services of the slave so difficult and interrupted, that it is presumed the buyer would not have purchased had he been aware of them.

And that the failure to make the reference did not proceed from inattention, is manifest by the 2506th article, which succeeds that just noticed, wherein the defects in other animals are extended to the cases supposed in the 2496th. So that the cause turns on the inquiry, is drunkenness a vice of body, or of character? Is it mental, or physical? We think it must be classed among the vices which our code denominates those of character. It has of late, we believe, been made a question by physiologists, whether the disposition to an immoderate use of ardent spirits, did not arise as much from physical temperament as from moral weakness. In cases of long indulgence in the habit, it is quite probable the body may require a continuance of the stimulus, and that the desire for the use of it may spring as much from physical lassitude, as from moral depravity. But on this subject the court has a safer guide than the conflicting opinions of medical men. By the ancient jurisprudence of the country, the vice of drunkenness was considered one of the mind. And the terms used in our legislation must be understood in the sense in which they were used in that jurisprudence, unless another meaning be expressly given to them by legislative authority. We conclude, then, that the allegation made in the petition does not furnish ground for setting aside the sale. It has been contended, that there was fraud in the defendant concealing from the plaintiff the defect to which the slave was addicted. But unless the vice was one which furnished ground for redhibition, there was no fraud in concealing it, or, in other words, there was no obligation in the seller to communicate it to the buyer.

2.

GAILLARD v. LABAT et al. Dec. T. 1835. 9 Louisiana Rep. 17.

But a fraudulent concealment of it, will be a ground for rescinding the contract.

The plaintiff alleged in his petition, that he had purchased of the defendant a slave, named Marie Jeanne, and her daughter Cecilia, for the price of \$1000, for a house servant; that the defendant knew that the slave was an habitual drunkard, and not worthy to be trusted; and prays the sale may be avoided as fraudulent, and the defendant be compelled to refund the price. The jury found a verdict for the plaintiff, rescinding the sale, and restoring the slaves to the defendant, and requiring him to return the price. The defendant appealed.

Per Cur. Bullard, J. This is not an action for redhibition. The plaintiff claims a rescision of the contract, not on the ground

that such a habit forms a redhibitory defect in a slave, but on the alleged false assertion, on the part of the defendant, of the qualities of the slave in question, on a fraudulent concealment of her vices and defects, and he relies upon article 1841 of the Louisiana Code. But whether the defendant knew of the existence of the vice of drunkenness, and concealed it, is a question for the jury, and judgment rescinding the sale will be affirmed, when the verdict finding the fraud is not so unsupported by evidence as to authorize the court to disturb it.

3.

CHRETIEN V. THEARD. June T. 1824. 14 Martin's Louisiana Rep. 582.

Per Cur. Porter, J. This is a redhibitory action, in which the plaintiff seeks to return a slave he purchased from the defendant, and get back the price. The defect alleged is, that the slave is a thief, and addicted to robbery, and it is further charged, that the vendor knew he had those vices, at the time he sold him. The evidence establishes, very satisfactorily, that the slave was a thief at the time he was sold;—that he committed theft after he came into the possession of the plaintiff; and that the defendant well knew he was addicted to this vice at the time he sold him. Several grounds of defence have been presented in this court against the right of the petitioner to recover. First. That the allegations in the petition do not correspond with the proof. The first objection was supported by the counsel for defendant, on the ground that the petition charged the slave with being addicted to *robbery*, and that the evidence went to prove he was in the habit of stealing. A recurrence to the petition shows that this exception is not well founded. It does not merely charge that the slave was addicted to robbery. It avers also, that he was a thief; that he had a propensity to thieving, and it sets out a particular act of larceny. These allegations fully authorized the introduction of the evidence taken on the trial, and even if they did not, the defendant could not claim the benefit of the variance in this court, when he suffered the proof to be received without objection, in that of the first instance.

An allegation that a slave was a thief, will authorize evidence that he was in the habit of stealing.

4.

OWEN v. FORD. Nov. T. 1823. 1 Harper's Rep. 25.

In South Carolina there is no implied warranty of the moral qualities of a slave.

Per Cur. Richardson, J. In the case of Richard Smith v. M'Call, 1 M'Cord's Rep. 220., this court decided, that there is no implied warranty of the moral qualities of a slave arising from the mere sale and price paid. As where a slave was sold who had committed burglary, the fact being unknown to both the seller and the purchaser. After the sale the slave was convicted, and his ears were cropped, held, that the implied warranty did not extend to the loss of the value of the slave by the punishment.

5.

AILS v. BOWMAN. March T. 1831. 2 Louisiana Rep. 251.

The habit of running away is not made out by proof of one act.

Per Cur. Martin, J. There is only evidence of the slave having ran away once while in the appellee's possession, and this does not constitute a *habit* of running away.

6.

BOCOD v. JACOBS. May T. 1831. 2 Louisiana Rep. 408.

Even immediately after the sale.

Per Cur. Martin, J. Circumstances posterior to the sale, may have some weight in the scale of evidence, in determining on the existence of a *previous* habit; but we do not think that the *mere* fact of running away immediately after the sale, added to a single instance before, may be received as evidence of an anterior habit. It may be the consequence of the displeasure of being sold, or of his dislike of the owner.

7.

DUNCAN v. COVALLUS' EX'RS. January T. 1817. 4 Martin's Louisiana Rep. 571.

If a slave be described, in the bill of sale as a *bon domestique, cochier, et briquetier*, and he be proven to be a good servant, and a coachman, and brick-maker, this will suffice.

Per Cur. Martin, J. The petition states that the plaintiff purchased from the defendants a negro slave for \$900, under the assurance they gave him, that he was a *good domestic, good coachman, and good brickmaker*, and possessed of the confidence of his former owner, whose executors they are; that there has been a gross fraud practised on him by the defendants; that the plaintiff, fully confiding in the assurance they gave him, signed the bill of sale, without reading it; not believing that any thing contained therein would have been inserted contrary to, or in opposition of the formal assurances given him, in relation to the qualities of the

slave, in which he avers he was deceived. The petition next sets forth, that the slave has made several attempts to run away, and is by habit a drunkard and thief, and was in the said bad practices long before the sale, at least in the knowledge of one of the defendants. It concludes with a prayer for the rescision of the sale. Urquhart, one of the defendants, being interrogated by the plaintiff, answers, that he gave no assurances as to the virtues, vices, or talents of the slave; that he knew nothing of him, except that he called himself a coachman. The bill of sale was introduced as evidence of the assurances stated in the petition; the defendants therein warrant the negro sold, free from redhibitory *diseases only*, as well as of any lien or mortgage, but not as to any redhibitory *vices*, declaring that they do not know the slave. In the description of him, he is stated to be 25 years of age, a *good* domestic, coachman and brickmaker: *bon domestique, cochèr, et brèquetier*. Four witnesses, introduced by the plaintiff, declared, that the slave was, from the moment he was taken into the family of the plaintiff, that is, immediately after the sale, a worthless, idle, drunken fellow, and knew nothing of the business of a coachman. A witness introduced by the defendants deposed, that he knew the slave, who was the deceased's coachman, and bore a good character; another, the deceased's overseer, deposed he knew the slave during a period of two years, while he belonged to the deceased; that he was at first employed as a brickmaker, was next the deceased's coachman, and afterwards as the driver of his other slaves; that he was a very faithful servant, and had the confidence of his master, who was very severe to his slaves; that he saw the negro drunk but once, and he never attempted to run away; that the deceased gave \$1800 dollars for him and his wife. On this the district judge gave judgment for the plaintiff. The defendants appealed.

The statement of facts is composed of the bill of sale, and the depositions of the above witnesses, and the defendant's counsel has waived any objection to the want of an averment in the petition of the falsity of so much of the bill of sale as relates to the slave being a good coachman; he contends, that they are not liable for any but physical or bodily defects, having declared that the warranty did not extend to moral ones, *vices*; and that the plaintiff has failed in the proof of the knowledge, in the defendants, of any circumstance which they were bound to disclose. That the allegation, that the slave was sold as a *good* domestic, a *good* coachman, and a *good* brickmaker, is not supported by the proof offered; the bill of sale

representing the slave as a *coachman*, not a *good* coachman ; that the defendants, knowing the slave to have been the deceased's coachman, might well describe him as a coachman ; that in the phrase used, the *adjective*, according to the French language, governs only the substantive, which it immediately precedes, and is not necessarily applicable to others in the phrase, *bon domestique, cochèr briquetier* ; that, if it be doubtful whether the adjective is to be extended to the two last substantives, the construction must be in *favorum solutionis*. That these witnesses prove, that the slave was a *good* domestic, since he had been selected to oversee his fellow servants ; had a good character ; that he never attempted to run away, and was seen drunk but once in two years. The plaintiff's counsel contends, that he has proved that the slave was deficient in the quality which induced him to purchase ; that he knew nothing of the business of a coachman ; that he was not a *good* domestic, since four witnesses swear that he has been, ever since the purchase, an *idle, worthless, and drunken fellow*. This court is of opinion, that the evidence, introduced by the defendants, repels all the allegations of fraud made by the plaintiff, and supports the averment they made, that the slave sold was a *good domestic, a coachman, and brickmaker* ; for we think, with their counsel, that the adjective *bon*, does not necessarily attach to any but the immediate substantive, *domestique*, and that if there be any doubt, the construction ought to be made so as to lessen, rather than to increase the obligation. Perhaps a literal translation into the English language might present a different idea. And the rule of the common law of England is in opposition to that which we are to follow. The common law says, *verba fortius accipiuntur contra proferentem* ; the civil law requires the constructions to be in *favorum solutionis*. Neither is the testimony of defendant's witnesses much weakened by that of those of the plaintiff's, though the latter be more numerous. These swear, that the slave knew nothing of the business of a coachman, and is an idle, worthless, and drunken fellow. He might conceal his skill from his dislike of a new master ; a great indulgence might render him idle, and free access to liquors might induce him to drink to excess ; and he consequently would appear idle, drunk, and worthless.

But this does not disprove what is sworn on the opposite side : that, *previous to the sale*, under a *severe master*, he was a faithful servant, bore a good character, and possessed the confidence of the deceased ; circumstances which strongly justify the assertion of the defendants, that he was a *good domestic*. The depositions of

the plaintiff's witnesses do not disprove what is sworn by those of the defendants, that the slave was a coachman and brick maker. Judgment for defendants.

8.

ICAR v. SUAMS. January T. 1835. 7 Louisiana Rep. 517.

This was a redhibitory action to annul the sale of a slave, and recover back the price, on the ground of redhibitory vice of craziness. The plaintiff alleged, that he purchased of the defendant a slave named Kate, for which he paid \$500, and in two or three days after it was discovered the slave was crazy, and run away, and that the vices were known to the defendant.

Craziness or idiocy is an absolute vice, and where it is not apparent, will annul the sale.

The witnesses stated she was very stupid; that on being told to do one thing she would do another; and that she was unsafe to be trusted about the house, on account of the danger of setting fire to it; that she wandered off, and was finally put in the parish jail of an adjoining parish, as a runaway.

The district judge gave judgment, that with regard to the mental malady of the slave, the evidence and a personal inspection satisfied him she was so far destitute of mental capacity as to render her either absolutely useless, or the use so inconvenient, that it was to be presumed the buyer would not have purchased had he known of the vice. The defendant appealed.

Per Cur. Bullard, J. It was contended, that Kate was not crazy, but only stupid, and stupidity is not madness; but, on the contrary, an apparent defect, against which the defendant did not warrant. Mere dulness of look is certainly apparent; but that degree of stupidity or want of intelligence, which results from a defective organization, is rather idiocy than stupidity. The code enumerates madness (*folie*,) among the absolute vices of slaves which give rise to the action of redhibition.

Whether the subject of this action is idiotic from nativity, or is laboring under one of the numberless derangements of an intellect originally sound, is a question which cannot be answered, without further knowledge of her history, than the record affords. Nor do we consider it material, inasmuch as the code has declared, that a sale may be avoided on account of any vice or defect, which renders the thing either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed the buyer would not have purchased with a knowledge of the vice. We are satisfied that the slave in question was wholly, and perhaps worse than useless.

LANDREAUX et al. v. CAMPBELL. June T. 1830. 20 Martin's
Louisiana Rep. 478.

When the redhibitory malady did not manifest itself within three days after the sale, evidence must be given of its previous existence.

Mathews, J., delivered the opinion of the court. This is a redhibitory action, in which the plaintiffs claim restitution of the price of a slave, named Ned, which they allege was affected with the absolute vice of madness, (as denominated by the *La Code*,) at the time they purchased him from the defendant. They obtained judgment in the court below, from which the latter appealed. A decision of the cause depends principally on matters of fact, applicable to the provisions of the 2508th art. of the code. According to these provisions, "a buyer who institutes the redhibitory action must prove, that the vice existed before the sale was made to him. But when it has made its appearance within three days immediately following the sale, it is presumed to have existed before the sale." In the present case there is no evidence which shows the existence of the malady or vice previous to the sale. Several witnesses were examined on the part of the defendant, who proved the soundness of the slave in question previous to, and at the time he was sold to the plaintiff. The act of sale was passed at Natchez, on the 4th of January, 1828, and recorded in the office of a notary, in the city of New-Orleans, on the 12th of the same month. The precise time at which Ned (together with other slaves bought at Natchez, and conveyed to the plaintiff by the same act,) arrived on the plantation of the purchasers, is not shown by the testimony of the cause. There were three witnesses examined for the appellees, two by commissions on interrogatories, and one in open court. The first of these appears to have been the overseer of the plaintiffs at the period when the slaves were brought to their plantation, and is the only one, who according to the facts declared in the testimony of all three, was in a situation to discover any appearance of madness in Ned within three days after the sale. He states that he remained on the plantation from the arrival of the slaves, some time in January, until the 6th of February, or about one month after they were placed under his management. During that period he declares that he did not perceive that the negro was attacked by any infirmity *d'acune infirmité*; he only appeared to be of a feeble constitution, was lazy, and would not work without being constantly watched; and when out of sight of the overseer, he would quit his work and wander from one place to another, gesticulating alone, *tout seul*. This testimony certainly

exhibits great defects in the slave, but does not, in our opinion, amount to proof of madness; at all events, of its appearance within three days from the time of purchase. And there is no proof that he was subject to any mental derangement previous to that period. Considering the many frauds which are practised on purchasers, by professed dealers in this species of property, we have reluctantly come to a conclusion on the facts different from that at which the judge, *a quo*, arrived. But it is believed by us, that the plaintiffs have not sustained their claim for redhibition by such proof as is required by law.

10.

ZARICO v. HABINE. March T. 1818. 5 Martin's Louisiana Rep. 372.

The plaintiff, as executrix to her late husband, caused the property of his estate to be sold at public auction, under the authority and directions of the court of probates, when the defendant, through an agent, bid for a negro man, was adjudged her, and immediately delivered to her said agent, who directed him to go to the defendant's. The negro, on his way, made his escape, and, being pursued, committed an assault, with intent to murder, for which he was tried and condemned to death, but afterwards pardoned and released. The defendant having refused to receive him, the present suit was brought against her. One of the grounds on which she resisted the plaintiff's demand, was, that if there was a sale, it ought to be annulled, on account of a redhibitory vice in the slave. There was judgment for the plaintiff, and the defendant appealed.

The vendee cannot demand the rescision of the sale, on account of a capital crime committed by the slave immediately after the sale.

Per Cur. Derbigny, J. We now come to the second plea of the appellant, to wit, the existence of a redhibitory vice in the property sold. The success of this plea rests upon the following circumstance: Immediately after the sale and delivery, this slave, instead of going where the appellant's agent sent him, ran off, was pursued, and committed an assault, for which he was condemned to death, and afterwards pardoned. From this the appellant concludes, that the slave had a redhibitory vice previous to the adjudication. To support this allegation, he relies on the following article of our code, as governing this case, to the exclusion of all testimony: "If the defect appears immediately after the sale, or within the three following days, it shall be presumed that said defect existed before the sale, or at the time it was made." This

provision seems to have been intended for cases of latent bodily defects, the origin of which is uncertain. But as the appellant insists upon its applicability to his case, let us see how it will bear the application. The vice, if any existed, was one of temper and disposition. Those are limited to three sorts: "Having been guilty of some capital crime, being addicted to robbery, or in the habit of running away." The first vice does not admit of the application of the rule, that a man has been guilty of a capital crime, and is not to be presumed from his subsequent conduct. The law does not speak of any such thing as the habit of committing crimes, but of a crime committed. The second vice has nothing to do with this case. The third, and last, is the habit of running away. This slave, it is said, ran off, instead of going where the appellant's agent had told him to go. Must this be received as a legal presumption that he was in the habit of running away? Shall a slave who changes masters, and runs off to avoid going with him, be presumed to be in the habit of running away? Surely no such presumption can arise from this fact. Supposing, then, the article relied on to be at all applicable to this kind of vice, still, the fact in this case does not authorize the presumption, so far as to render it unnecessary to support it by other proof, or to exclude contrary testimony. The district judge, therefore, acted correctly in admitting testimony as to the character of the slave; and that testimony having been perfectly satisfactory on the part of the plaintiff, the plea of the defendant must fail. Judgment affirmed.

11.

ANDRY et al. v. FOY. July T. 1819. 7 Martin's Louisiana Rep. 33. 44.

Per Cur. Martin, J. At the request of the defendant, a re-hearing has been had in this case, on the question whether *Horace* and *Boucaud*, two of the slaves sold by the defendant to the plaintiffs, were really in the habit of running away, at the time of the sale, so as to entitle the plaintiffs to their redhibitory action. The fact was found against the defendant by the jury, in the parish court; and, although this circumstance is not conclusive on the appeal, it cannot fail to have some weight. Horace was purchased by the defendant in March, 1808, and his vendor then expressly excluded the legal warranty against such vices, which the law considers as redhibitory ones, viz. capital crimes, robbery, and the habit of running away. This appears by the bill of sale on re-

What amounts to a habit of running away.

cord ; and the vendor did declare, that Horace ran away from him, and was absent seven consecutive months ; during which he went to New York, Liverpool, and Charleston, where he was arrested and brought to New Orleans ; where, five weeks after, he sold him to the present defendant, informing him he was a runaway ; and he was sold as such. It is in evidence, that Boucaud was brought to jail as a runaway before the sale to the plaintiff, and that he has since run away twice. In the sale of Boucaud to the defendant, the vendor warrants only against the *maladies* for which the law grants a redhibitory action. The counsel for the defendant thinks the jury and this court erred, in inferring from this testimony, that the slaves were in the *habit* of running away ; that one single instance of running away is proven anterior to the sale, which cannot constitute a habit. As to Horace's trips to New York, to Liverpool, and Charleston, and an absence of seven months, which ended by his capture only ; the circumstance of his being sold as a runaway ; the information given by the defendant's vendor, that he was a runaway, justify, in our opinion, the conclusion which the jury and this court have taken. As to Boucaud, the circumstances of his having been purchased by the defendant, with a simple warranty of the redhibitory *maladies*, of his having been committed to jail as a runaway once, would not authorize the same conclusion. But he ran away twice, within a very few days after the plaintiffs purchased him, which raises a presumption, when coupled with the preceding facts, that the habit of running away existed before the sale. Indeed, the cases of these slaves are not easily to be distinguished from that of *Macarty v. Bagneries*, 1 Martin's Rep. 149. There, there was no evidence of any repeated act of running away before the sale, but the slave had been kept several months in jail, and not liberated therefrom till the sale, and ran away soon after. Thus, Horace's voyages to New York, Liverpool, and Charleston, and the declaration of his then master, excite as much apprehension and alarm, as evidence of three ordinary acts of running away. It is therefore ordered, adjudged, and decreed, that the judgment of this court in this case be certified to the parish court, as if no rehearing had been granted.

12.

ANDRY et al. v. Foy. June T. 1819. 6 Martin's Louisiana Rep. 689.

Although several slaves be bought together, and for a single price, the sale will not be rescinded for all, if any number less than the whole have any redhibitory defect.

The plaintiff's bought from the defendant nine slaves, for \$10,500, payable in their note at one year. Six of them having successively ran away, they brought the present suit for the rescision of the sale, alleging, that the slaves were addicted to running away, in the knowledge of the defendant, prior to the sale. There was judgment for the rescision of the sale as to the six slaves who ran away, and the defendant was condemned to the payment of \$6,500. Both parties appealed.

Per Cur. Martin, J. It is true, the slaves were not sold separately, and for distinct prices; and after the sale the vendees refused to retain any of them, and rescind the sale for the others; but insisted on an entire compliance with, or an absolute rescision of the contract. These circumstances do not, however, appear to us sufficient to authorize the vendees in demanding the rescision of the sale of all the slaves, on account of a redhibitory defect in one or more of them. For they did not constitute a whole, as a company of comedians, or a span of horses, in which the value of each of the component parts is increased by its union to the rest. It is true, after the sale, the vendees declared their willingness to annul it *in toto*, and refused to do so partially; a circumstance, which is presented to us as giving rise to the presumption, that they would not have proceeded to the purchase of any number of these slaves, less than the whole. The presumption, however, appears to us too slight to be received as evidence. We therefore conclude, that the parish court did not err in refusing to rescind the sale *in toto*. The habit of running away is a redhibitory vice. Civ. Code. 358. art 79. A warranty against it is, therefore, of the nature of the contract of sale of slaves, i. e. it needs not be expressed in the deed. Hence the silence of the vendor in this case, as to this warranty, does not prevent him from being bound thereto. Neither does it appear to us that the circumstance of his having disclosed to his vendees the names of his own vendors, and referred, in his act of sale, to those of the latter, in any degree lessens his liability. This warranty, however, not being of the *essence* of the contract, may be excluded by the agreement of the parties. But the agreement must be proven, and the exclusion must be a fair one; that

is to say, the vendor must be ignorant of, or disclose the existence of the vice: In the present case, it is clear, that the disposition of six of these slaves to run away was known to the vendor, and that he did not communicate it to the vendees. The understanding of the parties, that the slaves should remain on trial during a fortnight, with the vendees, at the risk of the vendor, in case they ran away, does not enable us to conclude, that the intention of the parties was, that if after that period, they, or any of them ran away, and the vendees could prove a previous habit of running away, they should not avail themselves of the legal warranty. The existence of this habit in the six slaves, of whom the sale is rescinded by the judgment of the parish court, clearly appears from the evidence on the record, particularly the deposition of the jailor, and the orders of the mayor.

The defendant was bound, at the inception of the suit, to reimburse the price of these slaves; but this price was not fixed by the parties, and required to be liquidated. The parish court, therefore, erred in allowing interest from the date of the judicial demand. But no hire can be allowed. Both parties complain of the valuation made in the parish court, the vendor thinking it extravagant, and the vendees insufficient. Perhaps this is the best evidence of its correctness. It does not appear to us so materially incorrect as to authorize our interference.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the parish court be annulled, avoided, and reversed; and this court, proceeding to render such a judgment as, in its opinion, ought to have been rendered in the parish court, it is ordered, adjudged, and decreed, that the sale of the negroes, Lindor, Tony, Sunday, Isaac, Horace and Boucaud, be rescinded, and made null and void; and that the plaintiffs do recover from the defendant the sum of six thousand five hundred dollars, with costs, in the parish court, and that the plaintiffs pay costs in this court.

13.

CHRETIEN V. THEARD. June T. 1824. 14 Martin's Louisiana Rep. 582.

Per Cur. Porter, J. This is a redhibitory action, in which the plaintiff seeks to return a slave he purchased from the defendant, and get back the price. The defect alleged, is, that the slave is a thief, and addicted to robbery. And it is further charged, that the vendor knew he had those vices, at the time he sold him. Several grounds of defence have been presented in this court against the

Stealing need not be accompanied with force to constitute a redhibitory defect.

right of the petitioner. The second point of the defendant is, that the vice complained of, is not a redhibitory one ; that the stealing must be accompanied with force, to constitute this defect. If this construction be the true one, it will lead to the most inconvenient results, and open the door to great and numerous frauds. This consideration, we are aware, is not of much importance, if the law be clear and free from ambiguity ; but if otherwise, it is entitled to much weight in aiding our conclusions as to the purport and true meaning of the statute. The words of the law in the French text, are “ si l'esclave est adonné au vol ;” in the English “ if he is addicted to robbery.” *Vol* is the generic term, in the French language, for theft of every kind, and, it is admitted, embraces larceny. Robbery, it is said, means the offence known to our criminal law, as such. And it is urged, that the English version shows, that the word *vol* in the French was used in the restricted sense of taking the property of another by force. Our code was passed previous to the enactment of the constitution, and the legislature in adopting it, directed that the French and English texts must be taken together ; and that they should mutually serve for the interpretation of each other. 2 Martin's Dig. 98. Whenever, therefore, the expressions can be reconciled, and made to harmonise with each other, it is the duty of those on whom the task of construing them is devolved, to do so. When they cannot, such a construction must be adopted as does violence to neither, and gives effect to both. Thus, if the French part of the law made epilepsy alone a redhibitory defect, and the English had provided only for leprosy, we should hold, that both these diseases constituted vices for which the sale could be annulled ; because both were provided for ; and because at that time the legislative will expressed in either language, became a law. In the case of *Touro v. Cushing*, decided at the last July term, this principle was applied to the 122d article of the code, 369. The text there presented two distinct ideas to the mind, and we thought a compliance with either, sufficient on the part of him who claimed the benefit of the law ; otherwise, as was there said, the statute in relation to that provision, would be a *decoy*, instead of a *beacon*. And where they are not entirely different, as in the case before us, where the word in one text includes the meaning used in the other, and means something more, we must, on the same principle, take that which presents the most enlarged sense, because, in doing so, we give full effect to both clauses.

(C.) OF THE WARRANTY OF CAPACITY.

1.

STRAWBRIDGE v. WARFIELD. April T. 1832. 4 Louisiana Rep. 20.

Per Cur. Porter, J. The question is, whether warranty on the part of the owner of the property sold (slaves) be of the essence of the contract of sale; and this question the law requires us to answer in the negative. Warranty is in the nature of the contract of sale. That is, the law, implies it, if a contrary agreement be not made. But it is not essential to such a contract. The vendor may stipulate, he will not warrant at all; or he may covenant that his warranty shall be restricted; or he may contract that his vendee shall accept the warranty of a third person.*

Warranty is not the essence of a contract.

2.

PILIE v. LALANDE et al. April T. 1829. 19 Martin's Louisiana Rep. 648.

Porter, J., delivered the opinion of the court. This is an action of redhibition. The defendant pleaded the general issue. The slave was sold as a washer, ironer, and cook. The evidence shows, that she possessed these qualities, very defectively, if at all. The jury found a verdict for the plaintiff, reducing the price \$170. The defendants have appealed, and the plaintiff has required that the judgment be amended by the court decreeing a rescission of the sale. The evidence is contradictory, and does not authorize us to disturb the verdict. The only questions which require our particular attention are those presented by the two bills of exceptions, taken on the trial by the defendants. The plaintiff offered evidence to prove that the slave had run away after he had purchased her, and the court admitted it. We think there was no error in doing so. The proof in itself would not be sufficient to establish the fact, without showing that the slave had run away

In a redhibitory action the plaintiff may prove the slave ran away after he was purchased.

* An express warranty does not guard against that which can be discovered by sight; as if a horse be warranted perfect, and he wants an ear or a tail, Butterfield v. Burroughs, Salk. Rep. 211. But an express warranty extends to every kind of soundness known and unknown to the seller. 15 Petersdorff's Abr. 374.

Upon the sale of a ship advertised as copper fastened, with all faults, the court held, that these faults meant, faults of a ship, which might have been consistent with that description of vessel; and that not being a copper-fastened ship at all, it was a breach of the warranty. Shepard v. King, 3, B. & A. 240.

while in the possession of the vendor. But if the facts in regard to the absence of the slave antecedent to the sale were in any way equivocal, subsequent acts might aid in ascertaining their true character. The evidence, too, might be important, in showing a continuance of the habit which existed at the time of the sale. It has been the constant practice in actions of this kind, to admit such proofs. 7 Martin's Rep. 43. ; 10 Ibid. 659. Judgment affirmed.

(D.) OF THE WARRANTY OF TITLE.*

I.

COWAND et al. v. REYNOLDS. Feb. T. 1832. 3 Louisiana Rep. 378.

Liability of
surety, on
warranty of
title.

Guaranty of the title of a mulatto boy purchased by the plaintiffs. It being ascertained the boy was free, the present action was brought, to recover the amount of expenses incurred by the plaintiffs while the boy was in their possession.

The Court. Mathews, J. The surety of the vendor of a slave who warrants only the title, is not liable for expenses to which the vendee is put in consequence of the slave being affected with the redhibitory vice of running away ; but he is responsible for damages incurred in case of eviction.

* It was held, in Mackbee v. Gardner, 2 Har. & Gill's Rep. 176, that it was a familiar principle, that there exists, in every sale of personal property an implied warranty of title. And the same principle was recognized in Chism v. Woods, Hard. Rep. 531.; Osgood v. Lewis, 2 Har. & Gill's Rep. 495. In Defresne v. Trumper 1 Johns. Rep. 274, it appeared the defendant sold the plaintiff a horse, which was recovered of the plaintiff by a third person. The defendant contended the plaintiff could not recover, as there was no warranty, or fraud in the sale. But the court said, we are of opinion that an express warranty is not requisite ; for it is a general rule, that the law will imply a warranty of title on the sale of a chattel. The rule is laid down in 2 Black. Com. 451., that by the civil law, an implied warranty was annexed to every sale, in respect to the title of the vendor, and so too, in our law, a purchaser of goods and chattels may have satisfaction of the seller, if he sells them as his own, and the title proves deficient without any express warranty for the purpose.

And the same rule prevails in Great Britain. In contracts for the sale of personal property, the vendor impliedly warrants his title to the article he sells; and if he has no title, he is liable for a breach of this implied promise. 15 Petersdoff's Abr. 372. And the rule applies whether the seller is in possession of the thing sold or not, Ibid. ; 3 T. R. 15.; Rew v. Barber, 3 Cowen's Rep. 272. The Oneida Manufacturing Society v. Lawrence, 4 Cowen's Rep. 440.

2.

STRAWBRIDGE v. WARFIELD. April T. 1832. 4 Louisiana Rep. 20.

Per Cur. Porter, J. The question is, whether the fact of the vendor of the slave having concealed from the purchaser, no matter with what intention, the fact of his being the real owner, makes him responsible in warranty? We think not. It is clear, that the plaintiff could not now have the contract avoided on the ground that the defendant was acting merely as a broker, and was not the owner, as plaintiff supposed. For error in person with whom he contracted could not enable him to do so; the consideration of the person not being the principal cause of the contract. If the plaintiff could not have the contract set aside, we can discover no legal grounds on which it can be changed, and a subsidiary warranty granted to the buyer, for which he did not contract.

Of a sale by a broker.

3.

SCOTT et al. v. SCOTT'S ADM'R. Spring T. 1820. 2 Marshall's Rep. 217.; S. P. REW v. BARBER, 3 Cowen's Rep. 272.

The declaration alleged, that the defendant's intestate sold to the plaintiff a slave, and that he undertook and promised that he had a good title and lawful right to sell; and avers that he had no title or right to sell, but that the title was in one Robertson. Plea, the statute of limitations.

It appeared the slave was sold to the plaintiffs more than five years before the commencement of the action, but that within five years Robertson had recovered the slave of the plaintiff.

The circuit court instructed the jury, that if the defendant's intestate had no title to the slave when he sold him to the plaintiffs, the statute of limitations began to run from the time of the sale and delivery. But the jury found for the plaintiffs; and the court granted a new trial, and the plaintiffs excepted. On the second trial the jury found for the defendant, and the plaintiffs brought error to this court.

On the sale of a slave by a person having no title, and without warranty, no recovery by a third person is necessary to give the vendee his right of action; the right to sue originates from the deceit of the seller.

Per Cur. The Chief Justice. It is certainly true, that the statute could not have begun to run until the cause of action accrued; and if, as was contended on the part of the plaintiffs, a recovery under an adverse title was essential to give them a right of action, it would follow, as a necessary consequence, that the instruction given by the court to the jury was erroneous. But it cannot be admitted that the recovery was necessary to the plain-

tiffs' right of action. In the case of *Payne v. Rodden*, 4 Bibb's Rep. 304., it was held by this court, that the declaration against the vendor of a chattel upon his implied undertaking that he had title, was sufficient without an averment of a recovery by the right owner.

We are of opinion, that the plaintiffs' cause of action accrued on the sale and delivery of the slave, and that the circuit court correctly instructed the jury, that the statute of limitations began to run from that time. Judgment affirmed.

4.

MOCKBEC'S ADM'R. v. GARDNER et al. June T. 1828. 2 Har. & Gill's Rep. 176.

There exists in every sale of personal property an implied warranty of title—the exceptions are trustees and executors.

Trover for a slave. The plaintiff offered to prove by one Duvall, that the plaintiff's intestate purchased of the witness, as the administrator of William Warfield, the negro, and that at the time of the death of the intestate, was his property, and at the time of the sale was part of the assets of the said intestate. The defendant objected, that the witness was incompetent to prove that the negro at the time of the death of Warfield, was his property and at the time of sale was part of the assets of the intestate's estate. The objection was sustained by the court. *Dorsey*, Ch. J. And the plaintiff excepted.

Per Cur. Archer, J. It is a general and familiar principle, that there exists in every sale of personal property an implied warranty of title, and that the vendor cannot be a witness to sustain the title of the vendee. But here the witness was a mere trustee; and in that capacity sold the property. Executors, administrators, and other trustees, are exceptions to the rule; and a sale by them does not imply a warranty of title, unless there be fraud or an express warranty and eviction. Judgment reversed.

5.

FORSYTH v. ELLIS. July T. 1830. 4 J. J. Marshall's Rep. 298.; *M'GEE v. ELLIS & BROWNING*, 4 Little's Rep. 244.; *PEPPER v. THORNTON*, 6 Monroe's Rep. 27.; *HEAD v. M'DONALD*, 7 Monroe's Rep. 206.

Or perhaps any public agent.

M'Gee obtained judgment against Browning, and delivered a *fi. fa.* to Forsyth for levy, which was executed upon two negroes in the possession of Browning, and sold them to Ellis, he being the highest bidder. Browning sued Ellis in *detinue*, and recovered the

negroes. Ellis, not having paid off the sale bond, filed a bill to enjoin the payment, and the circuit court perpetuated the injunction. The court of appeals reversed the decree, and suggested that either Browning or the sheriff was liable; but that M'Gee, notwithstanding the foregoing facts, was entitled to the amount for which the negro sold. Ellis then sued Forsyth, and recovered judgment for the price of the negro, and the sheriff brought this writ of error.

Per Cur. Robertson, Ch. J. The question is, whether the sheriff is responsible to the purchaser for any defect of title. When, an individual sells personal property as his own, the law implies a warranty of title. But this rule does not apply to sales by an agent, whether he be a public or private agent. He does not sell the property as his own, and, generally, can be made responsible only for actual fraud, or gross negligence. In sales under execution, it seems to us, that it cannot be, nor has ever been understood, that the officer, either personally or officially, guarantees the title. And the fact, that no case is reported in which the sheriff was ever sued for an implied warranty, ought to have persuasive, if not decisive influence.

6.

KETTLETAS v. FLEET. Feb. T. 1811. 7 John's. Rep. 324.

The owner of a slave gave a written promise to manumit him in 8 years, and delivered it to a third person. The court held, that where the master sold the slave absolutely for his full value, after giving such a written covenant to a third person, and did not state to him the fact of there being a written covenant, and the vendee being ignorant of its existence, the concealment was a fraud, and vacated the contract.

Selling a slave absolutely, who is at a future time entitled to freedom, is a violation of the implied warranty of title.

7.

CROMWELL v. CLAY. Fall T. 1833. 1 Dana's Rep. 578.

Cromwell sued Clay in detinue, for a slave which one Orear sold to Cromwell at a time when Piper and Waugh had suits against Orear, for the purpose of subjecting the slaves to the payment of his debts. Clay took the slaves into his possession as deputy sheriff, on an order by the chancellor. And the question was, whether the deed of a purchaser *pendente lite* is void or voidable.

The purchaser of a slave while a suit is pending to subject it to the vendor's debts, takes the title dependent on the event of the suit.

Per Cur. Underwood, J. The bill of sale from Orear to Cromwell was not absolutely void, as the circuit court supposed. As the chancery suits had not yet been decided, it could not be affirmed that the complainants would certainly obtain decrees subjecting the slave to the payment of their demands. If the bills shall be dismissed, then the bill of sale is unquestionably good. Nor does it lose its efficacy until the decree is pronounced in favor of the complainants. In the mean time, the title of the slave will vest under it in Cromwell.

If a decree is rendered subjecting the slave to the payment of Orear's debts, such decree will avoid the bill of sale, to the extent of the debts. If a surplus is left on the sale of a slave, after paying the debts, such surplus might be claimed by Cromwell. The bill of sale is liable to be avoided by the decree, but it is not void. If the suit had been against Orear, the result would have been different. He could not protect himself by averring the pendency of a suit against him for the slave. Here the possession of the sheriff is under the authority of law, and the owner, having been divested of the possession, by an order of the chancellor, cannot reclaim it but by leave of the court.

(VIII.) HIRING OF SLAVES.*

1.

GEORGE V. ELLIOTT, December 1806. 2 Hen. & Munf. Rep. 6.

Elliott sued George on his bond for the hire of a negro slave for one year, and recovered judgment. George filed a bill, and obtained an injunction, alleging, that the slave in a few days after the hiring became sick, and soon after died.

If a slave hired by the year become sick, or runs away, the hirer must pay the hire; but it is otherwise if the slave die without any fault of the hirer; for in such case the owner must lose the hire from the death.

* Slaves are considered personal property, and subject to the rules and regulations of the use and possession, and also the sale and transfer of this kind of property. The owner can, of course, sell, mortgage, or hire out the property as he pleases, subject only to those rules which society has established for the regulation and government of personal estate. But however unlimited the owner may be in the use of the thing, the slave himself cannot hire himself out in any of the states. The statutes of the states contain a prohibition, with a penalty against the slave going at large, or hiring himself out. By the digest of the laws of Alabama, 1836. p. 393. § 14. it is declared, that if any person shall permit his or her slave to go at large, or hire him or herself out, every person or persons so offending shall forfeit and pay \$50; and the slave may be committed, and the owner prosecuted. And, by the Rev. Code of Virginia, vol. 1. p. 442.,

Per Cur. The only question in the case is, whether the plaintiff should be allowed a credit on his bond from the time of the negro's death to the end of the year, for so much as the hire for that time would amount to. The court understands the rule to be, where one hires a slave for a year, that if the slave be sick, or run away, the tenant must pay the hire; but if the slave *die without any fault in the tenant*, the owner, and not the tenant, should lose the hire from the death of the slave, unless otherwise agreed upon. By pursuing this rule, the act of God falls on the owner, on whom it must have fallen if the slave had not been hired; from which time it would be unreasonable to allow the owner hire. Hire! for what? for a dead negro! It would be rigid enough in the case of a special agreement; but where there is no such special agreement, to insist upon the hire appears to this court unjust in the extreme. See 1 Ruth. Inst. 250, 251; 1 Fonbl. Eq. 376; Powell on Contracts, 446.

2.

YOUNG v. BRUCE et al. Spring T. 1824. 5 Little's Rep. 324.;
S. P. HARRIS v. NICHOLAS, 5 Munf. Rep. 483.

Covenant upon the following instrument:

On or before the 25th of December, 1819, we promise to pay Aaron H. Young \$120, for the hire of a negro man named Dick, from this time till the 25th of December, 1819, to be returned well clothed at the time. As witness our hands and seals this 29th of December, 1818.

JOHN & HORATIO BRUCE.

The declaration averred, that the defendants had not paid the money, or returned the slave. The defendants pleaded, that by inevitable accident the slave Dick was drowned in the Ohio river, whereby they were prevented from returning the said slave on the day, &c. To this plea the plaintiff demurred. The court gave judgment overruling the demurrer.

Where the hirer of a slave covenants to return him at the end of the year, he is discharged from the covenant if the slave dies before the time.

§ 81, it is declared, that a slave going at large, or hiring himself out, may be committed by a magistrate, and may fine the owner, or may order the slave to be sold. And also by the Rev. Code of Mississippi, 374. § 25, 26, the owner is prohibited from licensing his slave to go at large and trade as a freeman, or hiring himself out. Provision is made whereby the slave may be seized, the owner fined, and, in certain cases, the slave may be sold. And by § 20, any citizen may seize a slave offering articles for sale, and take him before a justice of the peace, and the justice shall order the slave to be whipped, and forfeit the article to the person apprehending the slave. Similar provisions are to be found in the statute books of those states where this species of property is recognized.

Per Cur. Owsley, J. We do not construe the instrument to insure a return of the slave in case of his death. It was no doubt competent for the parties to contract upon terms most acceptable to themselves, and it is incumbent upon the court, to effectuate the contract according to what may be their supposed intention ; but it is not inferable from any thing contained in the writing upon which the action is founded, that the contracting parties intended to insure a return of the slave in case of his death. The writing contains no express stipulation to that effect, and there is not such an inadequacy between what may be supposed the value of a year's service of the slave, and the price agreed to be paid by the Bruces, as to afford any rational inducement from them, in addition to the hire which they were to pay, to insure the life of the slave.

3.

KEAS v. YEWELL. Fall T. 1834. 2 Dana's Rep. 348. S. P. SINGLETON v. CARROLL, 6 J. J. Marshall's Rep. 528.

Or where, by a bond of the nature of a covenant to restore the slave on the condition of a decree, and he runs away.

Yewell filed a bill against Keas to foreclose a mortgage on two slaves, and upon an order of the court, Keas gave bond to have the slaves forthcoming to answer the decree. Upon the final decree, one of the slaves not being forthcoming, according to the bond, Yewell sued Keas and his sureties on the bond. The defendants pleaded that the slave ran away between the execution of the bond and the rendition of the decree, and that they could not reclaim her. Verdict and judgment for plaintiff, and the defendants brought error.

Per Cur. Nicholas, J. In our estimation, the plea constitutes a valid defence to the action. The casualty by which the slave was lost is a peril incident to the very nature of such property ; and therefore in contracts and covenants concerning such property, that peril should never be presumed to have been intended to be guarded against, unless so expressly stipulated. It has accordingly been held by the court of appeals in Virginia, and by this court, that the hirer of a slave was excused, by the fact of the slave having run away without his fault, from his covenant to return the slave at the end of the year. In Singleton v. Carroll, the covenant of the hirer was as express, unambiguous, and unconditional, as that of the parties here. The same principle which exempted the hirer from responsibility there, must relieve the obligors in this bond also. The principle is laid down in that case, that the loss is not to be considered as provided against by a general covenant,

and its happening therefore presents the same excuse for non-performance, that the death of the slave would have done. We therefore think the court erred in sustaining the demurrer to this plea.

4.

WILLIAMS V. HOLCOMBE. Jan. T. 1814. 1 North Carolina Law Repository, 365.

The defendant hired of plaintiff, a negro boy about 16 years of age, who was consumed by fire in the defendant's still house, with its contents, which were valuable, the defendant with some difficulty escaping.

Where the slave is lost without the fault of the hirer.

The judge informed the jury, that if the time of hiring was not expired, the defendant was not bound, if he used ordinary care and attention, such as a prudent man would afford to his own property. On returning the verdict, the jury said, that they were of opinion, that the time of hiring had not expired, and gave the plaintiff three months hiring, at the rate of four dollars per month, making six pounds.

Per Cur. Seawell, J. The declaration in this case contains two counts: one to recover the value of the slave, the other to recover the hire.

As to the first, the jury found that the time of hiring was *not* expired when the accident befel the slave, and that the accident was not owing to the negligence of the defendant.

As to the other count, the jury found for the plaintiff, and assessed damages to six pounds. From the evidence on the trial, the plaintiff (if entitled at all on that count) was entitled to about *twelve* pounds. The defendant's counsel offered to increase the damages to that amount. As to the motion for a new trial, we are all of opinion, that the whole circumstances of the case were properly left to the jury, respecting the expiration of the time; and that the right of the plaintiff, in *law*, to recover, depending upon that fact, which the jury have found against him; that in a case of doubtful evidence the court should not disturb the verdict.

5.

HARRISON V. MURRELL. Spring T. 1827. 5 Monroe's Rep. 359.;

S. P. REDDING V. HALL, 1 Bibb's Rep. 536.

Harrison hired of Murrell two slaves for one year, for \$160, and covenanted to pay the amount at a specified time. The negroes had been in his possession but a month when one of them died.

Contra to case No 1. Covenant to pay for the hire of

a negro for a specified time is obligatory where the negro dies before the time.

After the time of payment, Murrel sued on the covenant, and recovered the full amount of the hire. Harrison filed a bill, and obtained an injunction against the judgment; but the circuit court was of opinion no deduction ought to be made, and dissolved the injunction; and dismissed the bill.

Per Cur. Owsley, J. The principle is not perceived upon which Harrison can be relieved from any part of the hire which he covenanted to pay for the negroes. Though it may, at first blush, seem hard that Harrison should be compelled to pay hire for the negro that died before the expiration of the term for which he was hired, it will, upon mature reflection, be found not to be unjust in Murrel to exact the full hire of the negro. The uncertainty of the negro's life was equally known to both Harrison and Murrel when the contract for hire was entered into between them. With that knowledge it was competent for them to contract in the way most acceptable to themselves, and when fairly made, the court possesses no power to alter or change the import of the contract.

6.

GRUNDY'S HEIRS v. JACKSON'S HEIRS. Spring T. 1822.
1 Little's Rep. 11.

And the hirer is chargeable with the physician's bill.

The court held, that the hirer of slaves is chargeable with physician's fees, and the expenses of their sickness, unless there is an express agreement to the contrary, between him and the owner.

7.

BAIRD v. BLAND et al. March T. 1817. 5 Munf. Rep. 492.

And he is liable for the interest on the hires when he purchases with legal notice of a better title.

The court held, that when a person who bought a slave with knowledge of a better title, and is decreed to deliver him up and pay the profits, interest ought to be charged against him upon the hires actually received by him from other persons from the date of the receipts, but not upon the profits of such slave while in his possession without being hired; the same being unliquidated, and merely conjectural sums, which he was in no default in not paying.

8.

REDDING v. HALL et al. Fall T. 1809. 1 Bibb's Rep. 537.

And is not entitled to abatement or sickness.

Held by the Court, *Boyle, J.* that the hirer of a slave is not entitled to abatement of hire for sickness, or for the physician's bills, unless there is a stipulation in the contract, and he is bound to pay

a proper attention to the health of the slave, or he will be responsible to the owner. See *Pollard v. Shaffer*, 1 Dall. Rep. 210.

9.

MIMS v. MIMS. Fall T. 1829. 3 J. J. Marshall's Rep. 389.

Held by the court, *Underwood, J.*, that the bailee of slaves is only liable for five years' hire anterior to the suit; but where slaves are mortgaged, or pledged, hire must be accounted for from date of mortgage or pledge, until debt and interest are discharged; then hire ceases till within five years before suit.

Limitation
of hire.

10.

GRIGSBY v. CLEARY. Oct. T. 1827. 5 Monroe's Rep. 514.

Grigsby, the testator, devised slaves to his wife and his sons Enoch, Mack, and Smith, during their lives, remainder over to others. Cleary, the plaintiff, hired Malinda of Enoch, the tenant for life, for one year. Enoch died before the end of the year, and Grigsby, the remainderman, took the slave; for which this action of trespass was brought. Verdict for plaintiff.

Per Cur. Bibb, Ch. J. If the tenant for life had hired Malinda to Cleary for one year unexpired at the death of the tenant for life, as that event happened after the first day of March, the lessee Cleary had a right to hold the slave against the remainderman, until the last day of December, according to the 47th § of the act concerning executors and administrators. 1 Dig. 532. And as the fact of hiring by the tenant for life was in issue, parol evidence of the declarations of the tenant for life, of his having hired the slave, is competent evidence against the remainderman. As an example to illustrate the rule put, the case of a similar question of evidence between one in possession under a tenant in fee of a slave, claiming by hire or gift of the tenant in fee, in an action against one claiming as heir, devisee, or executor, and the mind of the profession assents at once to the admissibility of the declarations of the tenant in fee, as competent evidence for the plaintiff against the heir, executor, or devisee, to explain the character and duration of the possession so delivered, whether as a letting to hire or as a gift. Because the act of the tenant in fee is obligatory on those claiming under him, as heir, devisee, or executor.

Where tenant for life of slaves dies after 1st March, his lessee will hold them for the remainder of the year, by virtue of the act Dig. 532. And the declarations of the tenant for life of the nature of his interest in them is proper evidence against the claims of those in remainder.

11.

WILLIAM LEVERETT et al. v. JOHN LEVERETT et al. 1827. 2
M'Cord's Rep. 84.

The act which requires the slaves on the plantation of a tenant for life, who dies after the 1st of March of any year, to remain thereon to finish the crop, does not give hire to the remainderman, but confers their services for the remainder of the year to the estate of the deceased tenant.

Temperance Leverett, by a deed from Ann Floyd, was entitled during her life to certain slaves, and after her death they were given over to the complainants. The tenant for life died on the 25th day of *March* 1824. Her executors, the defendants, kept these slaves on the plantation until they finished the crop of that year, under the authority given to them by the act of Assembly of 1789, Pub. Laws, 494., which is in the following words: "If any person shall die after the first day of *March* in any year, the slaves of which he or she was possessed, whether held for life, or absolutely, and who were employed in making a crop, shall be continued on the lands, which were in the occupation of the deceased, until the crop is finished, and then be delivered to those who have the right to them; and such crop shall be assets in the executor's or administrators' hands, subject to the debts, legacies and distribution, the taxes, overseer's wages, expenses of physic, food and clothing being first paid, and the emblements of the lands, which shall be severed before the last day of December following, shall in like manner be assets in the hands of the executors or administrators; but all such emblements growing on the lands on that day, or at the time of the testator's or intestate's death, if that happen after the said last day of December, and before the first day of *March*, shall pass with the lands. And if any person shall rent or hire lands or slaves of a tenant for life, and such tenant for life dies, the person hiring such lands or slaves shall not be dispossessed until the crop of that year is finished, he or she securing the payment of the rent or hire when due." The complainants contended that the defendants, the executors of Temperance Leverett, should pay them for the hire of the negroes from the death of their testatrix, on the 25th of *March*, 1824, till the 10th day of *January*, 1825, when the crop was gathered.

Dessaussure, Chancellor. The first exception depends upon the construction of the statute of 1789, which exacts, that on the death of a tenant for life of any estate which may determinate at an uncertain time, such death occurring after the first of *March*, the slaves of the estate are to be continued on the estate to the end of the year, or as the exception expresses it, "the estate is continued to the end of the year." The complainants contend, and the commissioner has decided, that though the property be so

continued under the statute, it is subject to hire. The statute does not say so, and never to my knowledge, has been so construed. I do not think it the sound construction, for I believe an essential benefit was intended, and not an illusory one. The exception must be sustained, and so much of the report overruled and corrected. The complainants appealed.

Per Cur. Colcock, J. This court concur with the Chancellor in his construction of the act of 1789; and I can safely say, that I never heard a doubt expressed as to the correctness of such construction. It is in furtherance of the common law doctrine of emblements, that he who has a right to sow shall be entitled to reap; which cannot be done in this country unless the negroes employed in making the crop are permitted to remain to the end of the year. It would often be of little advantage to the person taking, to remove the negroes after the crop is planted; whereas it might operate as a total destruction of the crop. The appropriation of the crop, as assets in the hands of the executors, certainly negatives the idea of allowing compensation by way of hire to the person entitled to the negroes. Decree affirmed.

12.

BACOT v. PARNELL. Jan. T. 1831. 2 Bailey's Rep. 424.

The action was brought upon a promissory note for the hire of a slave, for one year. The slave died within the year, and the defendant claimed an apportionment by way of discount, which was allowed by the court below.

Where a slave was hired by the year and died within the time, held that the wages should be apportioned.

The Court, *O'Neill, J.*, after referring to *Byrd v. Boyd*, 4 M'Cord's Rep. 246., *George v. Elliot*, 2 Hen. & Mun. 5., *Ripley v. Wightman*, 4 M'Cord's Rep. 447., observed, that a contract of hiring was generally an entire contract, but in certain cases an apportionment is allowed, and this was one of those cases. In this case the act of God (the death of the slave) has ended the contract of hiring. The owner is entitled to receive, and the hirer is bound to pay, only so much as the hire was worth from the commencement of the hiring until the slave's death.

13.

T. AND N. SCUDDER V. SEALS. June T. 1824. Walker's Mississippi Rep. 155.

A refusal by a person without color of a title to restore slaves upon the demand of the true owner to his possession, is such a fraud as brings the case within the provisions of the Habeas corpus act.

Per Cur. Ellis, J. After the death of Nathaniel Scudder, his wife administered upon the estate, and at the sale of the personal property, Margaret Scudder, daughter of the deceased, purchased Diesy and Daniel, the negroes in controversy, for which she executed her promissory note. After the purchase she intermarried with one Thomas Seals, who reduced the negroes into possession, and worked them on the old lady's plantation, but separate and distinct from her crop. In July, 1822, Mrs. Thomas Seals died, and her husband sold the standing crop, and hired the negroes to Thomas Scudder, one of the present defendants. The negroes were hired twice to Scudders, and finally came into the possession of T. Seals, who carried them to the house of James Seals, the plaintiff below, who purchased said negroes. The petition of James Seals, supported by the oath of D. Muse, states that Diesy and Daniel were either stolen or enticed out of his possession, some time in September last. Upon the hearing of the evidence on both sides, the judge had the property restored to the petitioner.

From the evidence introduced on the trial below, there cannot be a doubt in relation to the right of property. The only question for our consideration is, whether the petitioner has brought himself within the provisions of the 19th section of the *habeas corpus* act, which says: "If any slave or slaves for life shall be taken or seduced out of the possession of the master, owner or overseers of such slave or slaves, by force, stratagem, or fraud, and unlawfully detained in the possession of any other person," &c. The fact of the detention of the negroes by Scudder, when he must have known they did not belong to him, was an imposition upon the rights of the plaintiff below, and will bring the case within, not only the letter, but the spirit of the statute. It was a trick, a stratagem, to deprive the owner of the possession of his property, otherwise they never would have been detained after legal demand being made. Diesy and Daniel being in the possession of Scudder, is evidence they were taken by him, until the contrary appears; and a refusal to deliver them over to the owner, is conclusive that he wished to hold the property without even the color of title. This amounts, (as I have before stated,) to imposition, trick and stratagem, presenting a case liable to the operation of the statute, in

such case made and provided. I am of opinion the judgment of the court below ought to be affirmed.

14.

DILLIARD v. TOMLINSON. April T. 1810. 1 Munf. Rep. 183.

BREWER v. HASTIE, 3 Call's Rep. 24.; DEANS v. SCRIBA, 2 Call's Rep. 419.

Held by the court, that an executor or administrator who hires slaves belonging to the estate of his testator, or intestate, ought not to be charged with interest on such hire from the day it becomes due, where there is no proof that it was then collected, or that interest from that day was received upon it; but a reasonable time to collect and pay the money should be allowed before the commencement of interest; and no interest ought to be charged where the right to the slave was in dispute. The same principle was adopted and acted upon in *Whitehorn and Wife v. Hines*, 1 Munf. Rep. 557.

Of interest on the hire of slaves.

15.

STAFFORD v. STAFFORD. Oct. T. 1826. 17 Martin's Louisiana Rep. 145.

Per Cur. Porter, J. The plaintiff claims from the defendant a negro slave, and hire for the time he has been in his possession. The answer neither admits nor denies the allegations in the petition, but avers, that no demand has ever been made for the slave, and that if he be on the plantation of the defendant, it is without his consent, and that the plaintiff might have taken him away. The evidence fully sustains the allegations of the petition, and justifies the verdict given in the court below, for the slave and the hire. The judgment rendered thereon was correct, and it is, therefore, adjudged and decreed, that it be affirmed with costs.

The defendant cannot resist the plaintiff's claim for his negro, and the hire, on the ground that there was no demand

16.

KING v. COOPER, Executor of King. Dec. T. 1829, Walker's Rep. 359.

Per Cur. This was an action of assumpsit, brought by the appellee in the court below, as executor of the last will and testament of George W. King, deceased. The second point raised in this case grows out of the following facts, stated in the bill of exceptions, viz. that a certain negro man, named Denis, (for whose

Where A. dies, bequeathing a slave to B., which slave is in his possession at the testa-

tor's death and so remains, the executor of A. may recover his hire for the slave, upto the period of one year after the granting of letters testamentary to the executor; he, having by law, that time to examine into, and settle the debts of the estate.

hire the plaintiff had in part sued,) had been hired by testator, a short time previous to his death, to the defendant; the negro man was in the possession of defendant at testator's death, and the testator, by his last will and testament, had bequeathed the said negro man Dennis to the defendant; that the plaintiff, as executor, had demanded said negro from said defendant, immediately after testator's death, but the defendant refused to deliver up said negro to the said plaintiff; that one year after letters testamentary had been granted, an order of the orphan's court had passed, requiring the executor to pay off the legatees and distributees. The counsel for the defendant requested the court to instruct the jury, that the said negro man Dennis, of right, and according to law, belonged to the defendant, and that the plaintiff was not entitled, at the time this action was commenced, to recover from the defendant hire for the negro's services since the death of the testator, without evidence, on the part of the plaintiff, that there were debts due by the estate, which could not be paid without it; and the counsel further requested the court to charge the jury, that plaintiff had misconceived his remedy, and was not entitled to recover in this form of action. All of which instructions the court refused to give. The question for this court, arising upon this statement of facts, is, whether the defendant was bound to pay for the hire of this negro slave for the time specified in the agreement between him and the deceased, inasmuch as the deceased had bequeathed said negro to him, the said defendant. There would have been no doubt, if this slave had been hired to a stranger, but that the plaintiff might have recovered the hire; and although this slave was bequeathed to the defendant, he could not legally call on the executor for his bequest, until after the expiration of one year from the time of taking out letters testamentary. See Revised Code, p. 55. sec. 91. And although a legal right in the property of said slave vested in the defendant, as legatee on the death of the plaintiff's testator; yet the legatee could not reduce that right to possession, until after the expiration of one year from granting the said letters testamentary, during which time he was bound to pay the hire. The executor had one year to examine into, and settle the debts, &c. of the estate. I am therefore, clearly of opinion, that the plaintiff had the same right to have recovered this year's hire from the legatee, as he would have had from a stranger, who had no interest in the bequests of the deceased. Judgment affirmed.

17.

CLAGGETT v. SPEAKE. May T. 1798. 4 Har. & Millen. Rep. 162.

Special action on the case for the nonperformance of a parol agreement, to take care of, and return certain slaves to the plaintiff, who were at work on the defendant's vessel, at Alexandria. It appeared that the defendant agreed with the plaintiff, if he would suffer the negroes to remain until Saturday at their work on the vessel, he would carry them up to Georgetown in the ship's yawl, and deliver them safe to the plaintiff. It further appeared, that afterwards the plaintiff told the negroes that on Saturday they must leave the vessel, and make the best of their way home, and take care of the tools. On Saturday after the work was finished, the negroes went off in a pilot boat, and were drowned.

If a person who hires slaves, and engages to return them safe in a particular manner, and they are lost, having sent them in a different manner, he is answerable for their loss.

Per Cur. Gouldsbrough, Ch. J. The court are of opinion, and direct the jury, that if they shall be of opinion, from the whole of the evidence, that the plaintiff gave the negroes orders to return inconsistent with the contract and engagement made by the defendant and the plaintiff, then such directions, so given to the negroes, will release the defendant from any responsibility for the event which afterwards happened. But the court refuse to direct the jury, that if the plaintiff did give the directions stated by the defendant, in the manner, and under the circumstances so stated, the defendant is thereby freed from responsibility for the loss of the negroes. Verdict and judgment for the plaintiff, and the defendant appealed to this court, and the judgment was affirmed.

18.

THE STATE v. CLEMENS. Dec. T. 1832. 3 Devereaux's North Carolina Rep. 472.

The defendant was convicted on the following indictment:—

“The jurors for the state, upon their oath, present that Willie Clemens, late of &c. on &c., with force and arms at, &c., unlawfully did permit his slave, by the name of March, to hire his own time to divers persons, to the jurors aforesaid unknown, contrary to the act of the General Assembly in such case made and provided, and against,” &c. The defendant was convicted, and judgment for the state being rendered, he appealed.

Per Cur. Ruffin, J. This is an indictment against the master; and is founded on a misconception of the act of 1794. The sta-

The act of 1794, (Rev. C. 406.) to prevent owners of slaves from hiring to them their time, does not subject the master to an indictment, that remedy being against the slave alone.

tute directs the grand jury to make "presentment of any slave." The great purpose of the act is to prevent and abate the nuisance, as was said in *Woodman's case*. The proceeding is, therefore, primarily against that, and the notice to the master is to give him an opportunity, as in other cases, of defending his slave, and not defending himself personally. It is true, the owner is indirectly punished, by having his slave hired out for one year. But that is only the incidental consequence of the judgment. The personal liability of the master is for the penalty of twenty pounds. The act does not make him guilty of a misdemeanor, nor subject him to indictment. Judgment reversed.

19.

GRICE v. JONES. July T. 1827. 1 Stewart's Alabama Rep. 254.

When a special demand of the hirer is necessary.

Detinue for a slave hired to the defendant until he was demanded by the owner.

The defendant prayed the court to instruct the jury, that, if they believed the slave in question had been hired to him to continue in his service until demanded, a special demand was necessary before the plaintiff could have a right of action. The court refused to give the instruction.

Per Liscomb, Ch. J. We are of opinion, that if the slave was hired on these terms, a special demand must precede the right of action. Judgment reversed.

(IX.) OF MORTGAGE OF SLAVES.*

1.

VERDIERE v. LEPERTE. May T. 1832. 4 Louisiana Rep. 41.

The action was brought to recover from the defendant a number of slaves, which the plaintiff purchased of one Campbell, at

A mortgage of slaves made out of the state will not affect a subsequent bona fide sale by the mortgagor, unless it be recorded in the state.

* It has been frequently stated that slaves are considered as *property*, and in most of the states, they are considered as chattels personal. They are, therefore, subject to those rules and regulations, which society has established for the purchase and sale, and transmission from one to another, of that species of property. They, therefore, may be

Tallahassee, in the territory of East Florida. By the terms of sale, Campbell reserved a right of redeeming the slaves, upon the payment of the purchase money, within a certain time; but before that time, he brought the slaves to New Orleans, and sold them to the defendant. The sale of Campbell was never recorded in Louisiana. Judgment for defendant.

Per Cur. Martin, J. A vendee who suffers property to remain in the possession of the vendor, cannot resist the claim of a subsequent *bona fide* purchaser. And whether the indenture be considered as a deed of mortgage, as we conceive it really is, or as a deed of sale, as the plaintiff contends, it appears to us, the judge was equally correct in rejecting his claim, on account of the absence of the record of the mortgage in this state. A purchaser is not affected by a mortgage on property executed out of the state, unless it be recorded therein.

2.

DABNEY et al. v. GREEN. April T. 1809. 4 Hen. & Munf. 100.;

ROBERTSON v. CAMPBELL & WHEELER. 2 Call's Rep. 428.;

CHAPMAN v. TURNER, 1 Call's Rep. 380. 394.

The court, *Tucker, Roane, and Fleming, J's.* held, that under the circumstances, a bill of sale, though absolute on its face, will be deemed a mortgage; the true question always being whether a purchase of the property, or a loan of money, or forbearance of a debt. And the court allowed a bill of sale absolute, to be considered as a mortgage. And the same principle was recognised in *Ross v. Norvell*, 1 Wash's Rep. 14.

Whether the contract is a conditional sale or a mortgage, must depend upon the circumstances of the case, and is open for explanation.

3.

M'DOWELL v. HALL. Fall T. 1812. 2 Bibb's Rep. 610.

Held by the court, *Owsley, J.*, that where there was an absolute bill of sale for slaves, and a conditional defeazance and stipulation given to the vendor, they are to be taken together, and make one

And an absolute bill of sale and a defeazance are to be taken together.

mortgaged as personal property, or are the subject of a qualified or conditional sale, to suit the wants of the owner or purchaser of them. They are declared to be personal estate, by the Rev. Code of Mississippi, 379.; Rev. Code of Virginia, vol. 1. p. 431. 47. Indeed, they are considered the subjects of mortgage in all the states by custom, and which exists in many of the states by express statutory provisions.

By the Black Code of Louisiana, vol. 1 Dig. p. 102. sec. 10, it is declared, that slaves shall be reputed and considered real estate; shall be, as such, subject to be mortgaged, according to the rules prescribed by law, and they shall be seized and sold as real estate.

contract; and the defeazance having suspended the right of the vendee, to take possession of them, until the death of the vendor, the statute of limitation did not begin to run until the death of the vendor.

4.

DORSEY v. GASSAWAY. June T. 1809. 2 Har. & Johns. Rep. 402.

Effect of
sale by the
mortgagor.

Held by the court, *Chase*, Ch. J., that if a mortgage of slaves was subsisting, and the mortgagor, claiming the absolute ownership of them, sold them for a full consideration, although as to the mortgagee the sale would transfer only the equitable interest, yet as between the vendor and vendee, the operation of the contract would be to pass the absolute ownership in the slaves to the vendee, and, notwithstanding the after discharge of the vendee, under the insolvent law, and his purchase of the slaves from the mortgagee, his subsequent acts, in perfecting his title to the slaves, will enure in law to confirm, and not to defeat his contract.

5.

DORSEY v. GASSAWAY. June T. 1809. 2 Har. & John's. Rep. 402.

* A sale by the mortgagor passes the title to chattels to the vendee as between the parties.

Per Cur. Chase, Ch. J. If a mortgage of slaves was subsisting, and the mortgagor claiming the absolute ownership of them, sold them for a full consideration, although as to the mortgage, the sale would transfer only the equitable interest, yet as between the vendor and vendee, the operation of the contract would be to pass the absolute ownership in the slaves to the vendee.

* A mortgagor is the owner against the world, and only subject to the lien of the mortgagee. And if the thing mortgaged be land he is supposed to be seized before foreclosure.

6.

HUGHES v. GRAVES et al. Spring T. 1822. 1 Little's Rep. 317.

Palmer mortgaged two slaves to Hughes, Fanny and Esther. Palmer afterwards sold Fanny to Walker, and he also sold Esther to Graves. The mortgage debt not being paid, Hughes filed a bill against Palmer, Walker, and Graves. Walker, in his answer, admitted that he purchased Fanny; but averred it was without notice of the mortgage. The court pronounced a decree directing the sale of Fanny. Hughes filed a supplemental bill, stating the proceedings on the former bill, and averring, that Esther, when purchased by Graves, was of little or no value, and soon after died; and that Fanny, subsequent to the execution of the mortgage, had two children, which were claimed by, and in the possession of Walker, and prays that they may be delivered up to satisfy the balance of the mortgage debt. But the court decreed that Graves, the purchaser of Esther, should pay the balance of the mortgage debt.

The children of a female slave mortgaged, born after the execution of the mortgage, are as much liable to the demand of the mortgagee as the slave herself.

Per Cur. There can be no doubt but the slave Fanny was liable to the mortgage. Walker having been a purchaser without notice, in fact, of the mortgage, is an immaterial circumstance. For the mortgage having been duly recorded, the law will presume notice. Besides, the legal title was by the mortgage vested in Hughes, and the want of notice only protects a purchaser against a latent equity, and not against the legal title. Nor can there be any doubt but that the children of Fanny, born after the execution of the mortgage, are as much liable as Fanny herself; for it is a settled rule, that the offspring belongs to the owner of the mother, *partus sequitur ventrem* being a maxim of the civil law.

7.

TURNBULL v. MIDDLETON et al. Dec. T. 1831. Walker's Mississippi Rep. 413.

Per Cur. Black, J. The court are unanimously of opinion, that where slaves are mortgaged for the payment of a debt, the mortgagor, or other person having the slaves in possession, is liable for hire after the forfeiture of the condition of the mortgage, by the nonpayment of the money on the day due; that the offspring of such slaves, born after such forfeiture, are not subject to lien under the mortgage.

The mortgagor of slaves not liable for hire, on forfeiture of the condition of the mortgage.

That, in this case, the mortgagee having released the other slave, in the mortgage mentioned, for a much less sum than their real value, and being more than sufficient to have fully satisfied the debts, and having retained only \$700, is evidence of combination between mortgagor, and mortgagee to prejudice the rights of an innocent purchaser of one of the slaves mortgaged ; and would be so great a hardship on this innocent purchaser, for valuable consideration, that the court will not enforce the mortgage lien.

8.

DABNEY AND OTHERS, EXECUTORS AND LEGATEES OF SADLER v. GREEN. April T. 1809. 4 Hen. & Munf. Rep. 101. 109.

The right
of redemption.

Tucker, J. The bill states, that Green, being indebted to *Sadler*, on the 7th of March, 1778, executed a deed to him for six negroes, to secure the payment of the debt, and that *Sadler* executed at the same time a defeazance, whereby he agreed that, on payment of £126, 11s., (the debt before mentioned,) in three years, the right of *Sadler* to the slaves should cease. That *Green* was to keep possession of the slaves, paying interest on his debt, for which *Green* at different times gave his notes, under the name of hire for the slaves. That *Green* being absent from his home for a short time on business, in December, 1789, *Sadler* took out an attachment on his estate, which was levied on these negroes. Judgment in the attachment suit was obtained against *Green*, and the slaves sold under an execution issued upon that judgment ; and that they were all purchased by *Sadler* for £159. The object of the bill is to set aside the sale and redeem the negroes. The defendants admit that *Green* was indebted to *Sadler* at the time he executed the bill of sale, which they insist was an absolute conveyance and transfer of the property both at law and in equity. They then proceed to state, by way of defensive allegation, that *Green*, before suing out the attachment, had absolutely absconded, and was on board a vessel with the negroes, and other effects, six miles from his home, when he was overtaken by the deputy sheriff, in a calm, who levied the attachment on the slaves. This fact is proved by the testimony of two witnesses ; one of whom (the deputy sheriff) says, that *Green*, after some conversation, observed, that if there had not been an unlucky calm, he should have been far enough out of reach ; and thinks he said he should have been in Carolina. That the bill of sale given by *Green* for the negroes, was intended only as a security for his debt to *Sadler*, and not as an absolute conveyance, or even a conditional sale, is, I think,

obvious, not only from the papers themselves, but from the admission in the answers, that there was a *previous debt* due from *Green* to *Sadler*, which distinguishes it from the case of *Chapman v. Turner*, 1 Call's Rep. 280. ; and brings it within those of *Ross v. Norvell*, 1 Wash. Rep. 14. ; and *Robertson v. Campbell and Wheeler*, 2 Call's Rep. 424. I consider the original transaction between the parties, therefore, merely as a mortgage ; and I hold, that if a creditor by bond, or other legal right which he is enabled to prosecute with effect at law, obtains from his debtor a mortgage by way of security for the same, and then prosecutes a suit at common law, and having obtained judgment for his debt, levies the execution upon the mortgaged property, which is sold by the sheriff, and purchased by the creditor, the *debtor's* right to redeem is not extinguished by this proceeding at law, but his equity of redemption continues as fully and completely as before the execution was levied, or the judgment obtained. And this upon principle ; for the creditor having accepted of the security for his debt, is bound by every condition that a court of equity might impose upon him ; nor can he by his own act absolve himself from any such equitable obligation.

The case of *Lord Cranstown v Johnson*, 3 Ves. jun. 170., is a much stronger case than the one I have put ; and shows that a creditor purchasing property, sold under execution to pay his own debt, may, under circumstances, be considered as holding the same only as security for his debt, and the charges he has been put to. But there are several features in this transaction which give to this particular case a very different complexion. *Green* is proved to have absconded fraudulently with his family and property, among which were, or a considerable part of these slaves, and had actually embarked on board a vessel, and proceeded some distance on his way to another state, or some other quarter of this state, where he could conceal himself and his property from the very creditor to whom he had pledged it as a security. One of the soundest maxims of equity is, 'that he who hath committed iniquity, shall not have equity.' Francis' Max. 2. ; that is, as explained by Fonblanque, b. 1. c. 2. s. 13, note (p,) where such person is, as in the present case, plaintiff. *Willingham v. Joyce*, 3 Ves. jun. 168., is not so strong a case as this ; for here the present plaintiff did all in his power to defraud his creditor. The latter was driven to seek redress at law. Whether the proceedings in the cause were regular or erroneous, cannot be inquired into in a collateral way. The judgment must

be taken to be right, the sale lawful, and the purchase by the creditor the same as the purchase by any other person. The fraud of *Green* has utterly deprived him of the aid of a court of equity, which ought never to interpose to deprive a fair creditor, as *Sadler* was, of a legal advantage, gained in a due course of law, in consequence of a most flagrant attempt on the part of the debtor to defraud him. The staleness of the claim, postponed till after *Sadler's* death, and barred at law by the act of limitations, furnishes additional reasons in support of this opinion. The other judges concurred in this opinion.

9.

FIELD v. BEELER et al. Spring T. 1813. 3 Bibb's Rep. 18.

Who to be
made parties.

Held by the Court, *Boyle*, Ch. J., that upon a bill to redeem a slave pledged to secure the payment of money, it is sufficient to make the executor of the mortgagee a party, and it is unnecessary to make the heirs parties.

10.

MOORE'S EXECUTOR v. WILLIAM AYLETT'S EXECUTORS, AND PHILIP AYLETT. Oct. T. 1806. 1 Hen. & Munf. Virginia Rep. 29.

On a sale
by the
mortgagee
he must ac-
count for
the surplus

In this case the court of appeals decided that if it be agreed between a mortgagor and mortgagee, that, in case the debt be not paid, the mortgagee may sell the property; and in consequence thereof, he sells without proof of fraud, he is accountable to the mortgagor for the surplus of the sum for which he sells above the amount of the debt, with interest on such surplus until payment; but not for *profits*, unless he appears to have received them previous to the sale, nor for the value of the property at any subsequent time.

11.

HEAD v. HOBBS et al. April T. 1829. 1 J. J. Marshall's Rep. 283.

The pos-
session of
the mort-
gagor after
forfeiture
is not fraud
per se.

Held by the court, *Robertson*, Ch. J., that possession of a mortgagor, even after forfeiture, is not *per se* evidence of fraud; when the mortgage or conditional sale is good in the beginning, it will continue good in law, notwithstanding the possession of the mortgagor or the vendor. See *Hamilton v. Russel*, 1 Cranch's Rep. 309.; *McGowan v. Hay*, 5 Little's Rep. 243.

12.

FENWICK v. MACY'S EX'RS. Spring T. 1833. 1 Dana's Rep. 277.; ROSS v. NORVELL, 1 Wash. Rep. 14.; YOUNG v. WISEMAN, 7 Monroe's Rep. 270.; MIMS v. MIMS, 3 J. J. Marshall's Rep. 103.

The facts of the case appeared to be these: Macy advanced money to Fenwick in 1807, on the sale of three slaves, which Fenwick retained at hire. In June, 1822, Fenwick filed a bill, in which he claimed his right to redeem the slaves, on the ground that the contract between him and Macy should be regarded as a mortgage. The executors of Macy insisted upon the lapse of time in bar of relief. The court below held, that the contract of sale being intended only as security for the advance of money, the sale was to be treated as a mortgage, and dismissed Fenwick's bill upon the ground, that as five years adverse possession was a legal bar to the recovery of a slave in an action at law, the chancellor should adopt the same rule and apply it to bar the mortgagor's equity of redemption, after the mortgagee had been in possession five years. The statute of limitations would furnish the rule, and would be applied by the chancellor.

Per Cur. Underwood, J. Upon the principle of conforming to the statute of limitations, the chancellor should, where slaves are adversely held by a mortgagee for more than five years, refuse a redemption when applied for by the mortgagor. To put a strong case; if possession of a slave be with the mortgagee, and he were to notify the mortgagor that his right to redeem was denied, and that the mortgagee held the slaves in his own right, free from incumbrance, the chancellor would give no relief after five years' acquiescence on the part of the mortgagor, in the possession of the mortgagee under such circumstances. If he did, it would outrage the policy of the legislature as manifested by the statute.

The right which a mortgagor of a slave has to redeem, may therefore depend upon the nature and character of the possession held by the mortgagee. If the possession be adverse, he must seek his remedy within five years. If it be not adverse, he may have twenty years to redeem, and no longer. Why not a longer time, when the possession is not adverse? Because, after twenty years, the equity is stale, and the presumption is strong that the mortgaged debt is satisfied, and good policy requires that things long acquiesced in, should not be disturbed on account of the difficulty of reaching the whole truth.

The possession of a mortgagee or mortgagor of a slave amicably, is not affected by the statute of limitations, but the statute begins to run when the amicable possession is changed to an adversary one, and where the possession has continued 20 years it is presumed to have been adverse from the beginning.

Per Robertson, Ch. J. The character of the thing mortgaged, whether it be a slave or land, cannot affect the dignity of the mortgage itself. The equity of redemption, being a right exclusively within the cognisance of the chancellor, does not come within the operation of any statutory limitation. But policy and justice require, that all equitable claims should be asserted in a reasonable and convenient time. Twenty years have been designated by chancery practice as the proper time within which rights, purely equitable, should be asserted, and beyond which, the chancellor should not, generally, hear an application for relief. In *Hovenden v. Lord Annesly*, 2 Sch. & Lef. 637., Lord Redesdale said, that, "every new right of action in equity that accrues to the party must be acted upon, at the utmost, within twenty years." This must be understood, with the implied qualification, that there has been no intermediate disability or recognition.

A mortgagor or mortgagee in possession under the mortgage, holds as mortgagor or mortgagee, and not adversely, the one to the other. As long as he so holds, the statute of limitations does not, even as to the legal right, commence running; and it will not commence at law until the amicable possession shall have become adverse. But if either the mortgagor or mortgagee be permitted to remain in possession for twenty years, without any recognition, express or implied, of the existence of the debt, there should afterwards be no eviction, foreclosure, or redemption, against the will of the party so continuing in possession. The law will not presume that such a possession, thus long continued, had been amicable, but will consider it, after the end of twenty years, to have been adverse from the beginning, or from the time when the mortgage debt was due, unless some opposing facts interfere. The payment of the debt will be presumed, and nothing appearing to the contrary, the presumption will be, that it was paid when it became due, and that, of course, the possession, from that time was adverse, and not in the character of mortgagor and mortgagee. Hence, if the mortgagee bring an ejectment against the mortgagor, after such unqualified possession of twenty years, the statute of limitations may bar the action; and if he filed his bill to foreclose, he may be barred, not only in analogy to the statute of limitations, but because his claim has become too stale and questionable to justify an enforcement of it in equity. The same principles apply to the mortgagor's equity of redemption, after a continued possession by the mortgagee for twenty years. But if, within twenty years,

there shall have been any acknowledgment of the subsistence of the debt, or of a holding under the mortgage, the lapse of time may not operate as a bar at law or in equity.

If a slave be mortgaged, less than twenty years will not bar the equity of the mortgagor, or the right of the mortgagee, unless the party in possession shall have shown clearly that he disclaimed holding under the mortgage, and had held independently of it, and adversely to the right of the other party to it. In less than twenty years neither law nor equity will presume a transmutation of the possession, from its original and amicable, into an inconsistent and hostile nature. The right to redeem a mortgaged slave is precisely the same as the equity of redemption in land. It is the creature of equity, and is nothing but equity. And therefore the statute of limitations does not apply to it; but the right to redeem may continue for twenty years to exist; and indeed, facts may have intervened which may extend it beyond twenty years, just as if the thing mortgaged had been land. But as soon as the mortgagee shall renounce his mortgage, and assert an absolute and indefeasible right to the slave, independently of the mortgage, the relation of mortgagor and mortgagee will cease to exist, and the statute of limitations will, of course, *eo instanti*, commence running; and, consequently, such an adversary holding for five years would be a legal bar for restitution, and should equally bar the equity of redemption; for in such case the equitable right would correspond with the legal right, and five years' adversary possession would have vested title absolutely in the holder. See *Reed v. Lansdale*, Hard. Rep. 6.; *Ballinger v. Worley*, 1 Bibb's Rep. 198.; *Breckinridge v. Brooks et al.*, 2 Marsh. Rep. 339; *Morgan's heirs v. Boon's heirs*, 4 Monroe's Rep. 297.

13.

CLAIBORNE v. HILL. Spring T. 1793. 1 Wash. Rep. 177.
185.

The court, *Pendleton*, president, held, that a mortgagor of personal property continuing in possession is not evidence of fraud, if the mortgage be upon a *bona fide* consideration, and be duly recorded.

A mortgagor continuing in possession is not evidence of fraud.

14.

THOMPSON v. PATTON. Spring T. 1824. 5 Little's Rep. 74.
 S. P. ROSS v. NORVELL, 1 Wash. Rep. 14. 19.; THOMP-
 SON v. DAVENPORT, 1 Wash. Rep. 126.

Parol evi-
 dence is in-
 admissible
 to prove
 that an ab-
 solute bill
 of sale for
 a slave was
 intended
 for a mort-
 gage.

The complainant alleged in his bill, that he borrowed money of the defendant, and made a bill of sale of his slave, under the understanding and agreement that the slave should be returned in one month after. The answer relied on the bill of sale being absolute.

And the question was, whether the bill of sale for the slave was intended to be a sale, or whether it was a mortgage.

Per Cur. Mills, J. The question must rest on the inquiry, whether, under the circumstances of the case, the parol proof of what was the real contract between the parties, or whether parol proof, changing the absolute transfer into a mortgage, is admissible. Such proof has been admitted to enable the court of chancery to decide between a mortgage and conditional sale; and instances may not be wanting of such proof being admitted to convert absolute sales into mortgages; but whether the admission of such proof can be sustained upon principle, is an inquiry worthy of our attention. That such proof is admissible in cases where it is first shown that the deed or writing was drawn different from what was intended, by mistake or fraud, or was executed under circumstances where the free agency of the grantor was controlled, or where it is usurious, as the statute against usury admits of such proof, or under any previous circumstance which may legitimately lay a foundation for or open the door to such testimony, cannot be doubted; but whether it is admissible in every case, and may be used to add to, or insert a condition in an absolute deed, by showing that such was the agreement and understanding at the time of its execution, but not inserted in the writing, is a different question. Upon examining the authorities on this subject, we find them not consistent with each other; for although most of them recognize the general principle that parol evidence is not admissible to vary the written contract, yet courts have made so many exceptions to the rule, that they have, if all the cases are to be sustained, pared down the rule itself to scarcely the rank of an exception. Parol evidence in this case cannot be admitted.

15.

ENGLISH v. LANE, January T. 1825. 1 Porter's Rep. 328.

The question before the court was, whether an absolute bill of sale of a number of negroes could be explained by parol evidence, and proved to have been understood by the parties, and intended by them to be operative as a mortgage of the negroes.

An absolute bill of sale may be shown to have been intended a mortgage.

The court, *Siffold, J.*, (after referring to *Parkhurst v. Van Courtlandt*, 1 Johns. Chan. Rep. 273., *Vandervoort v. Col. Ins. Com.*, 2 Caines' Rep. 155., *Mumford v. M'Pherson*, 1 Johns. Rep. 414., *Watson v. Stackett's Adm'rs*, 6 Har. & Johns. Rep. 435., *Ross v. Norvell*, 1 Wash. Rep. 14., *Hatter v. Etenaud*, 2 Dess. Rep. 570., *Clark v. Henry*, 2 Cowen's Rep. 324.,) held, that it was a general rule, that a written contract could not be contradicted, varied, or explained by parol; yet an absolute deed may be shown, by parol proof, to have been extended to operate as a mortgage in cases of fraud.

16.

HOUTON v. HOLLIDAY. Jan. T. 1812. 1 North Carolina Law Repository, 87.

Henry Taylor by his will, dated 21st November, 1799, bequeathed to his daughter Lucy, a negro man, Harry. In March, 1800, Taylor borrowed of William Holliday, the defendant, one hundred pounds, and to secure the payment, executed a deed of sale in the usual form, to which the following clause was added :

"The conditions of the above bill of sale is such, that if the said Henry Taylor, his heirs, executors or administrators, doth and shall, well and truly pay to the said William Holliday, or his heirs, on or before the 25th day of December next, the sum of two hundred dollars, then the above bill of sale to be null and void, otherwise to remain in full force until the said Taylor doth pay the sum of two hundred dollars. Signed, sealed, and delivered, the day and year first above written."

Where a slave is pledged to secure the payment of a sum borrowed, the pledgee is liable in assumpsit for the profits of the slave beyond the interest of the debt the principal sum being paid.

"HENRY TAYLOR, Seal.

"Test. Titus Car."

Taylor died in April, 1800. His will was duly proved, and *Micajah Edwards*, the executor therein named, qualified in the same month. The plaintiff intermarried with the legatee, Lucy, in April, 1801; and upon the marriage, the executor of Taylor assented to the legacy of the negro Harry to the plaintiff. The

negro Harry remained in the possession of the defendant, from March, 1800, until April, 1803, and is worth thirty pounds a year. In April, 1803, the plaintiff paid Holliday, (for which the negro was pledged,) two hundred dollars, and the negro was delivered to him. He then demanded satisfaction for the services of the negro, which the defendant refused to make. Upon this case the plaintiff brings his action, and declares ;

1. For the wages of the negro, from the death of Henry Taylor, to the surrender by defendant in April, 1803.

2. For many had and received by defendant to plaintiff's use, for the excess of what was paid defendant more than was due of the sum lent, allowing the wages of the negro annually to diminish the debt and interest. The jury, under the charge of the court, found a verdict in favor of the plaintiff for the sum of forty-eight pounds, estimated as the wages of the negro from the time of plaintiff's marriage with Lucy, the legatee, until the delivery in April, 1803, deducting the interest of the sum borrowed for the same term. It is submitted to the opinion of the supreme court, whether the said verdict shall stand.

Per Cur. Taylor, Ch. J. It has been the uniform practice of the courts of equity in this state, to make a mortgagee in possession, account for the rents and profits, upon a bill filed for redemption. This is a necessary consequence of the principles which prevail in those courts relative to a mortgage, which is considered only as a security for money lent, and the mortgagee a trustee of the mortgagor. To sanction an opposite doctrine even in the cases of pledges, where the profits exceed the interest of the money lent, would be to furnish facilities for the evasion of the statute against usury, almost amounting to a repeal of that salutary law. Nothing can come more completely within the legal notion of a pledge, than the slave held by Holliday in the present case ; for, by the very terms of the contract, it was so to continue until the money should be paid, no legal property vesting in Holliday, who had only a lien upon it to secure his debt. All the profits, therefore, exceeding the interest of his debt, he received to the plaintiff's use, and cannot conscientiously withhold. Wherever a man receives money belonging to another, without any valuable consideration given, the law implies that the person receiving, promised to account for it to the true owner ; and the breach of such implied undertaking, is to be compensated for in the present form of action, which is, according to Mr. Justice Blackstone, "a very extensive and

beneficial remedy, applicable to almost every case where a person has received money, which *ex equo et bono*, he ought to refund.' Nor is its application to a case like the present without authority from direct adjudication. The case of *Astley v. Reynolds*, in *Strange*, 915., furnishes an instance of a man's being allowed to receive the surplus which he had paid beyond legal interest, in order to get possession of goods which he had pledged. In principle, the cases are the same; the only thing in which they differ is, that in the case before us, the money was received by the defendant from the labor of the pledge; in the other, it was paid by the plaintiffs. We therefore think the plaintiff is entitled to judgment.

17.

WOLF v. O'FARREL. Nov. T. 1812. Constitutional Court
Rep. 151.

This was a motion to set aside a nonsuit ordered on the ground of a failure of necessary evidence to maintain the action. The action was *trover*, for the conversion of a negro slave.

The plaintiff's claim was founded on an instrument of writing containing a conditional contract of sale by the owner of the slave, *Snell*, to the plaintiff, by way of mortgage, to secure the payment of a sum of money lent by the plaintiff to *Snell*.

A mortgagee of a slave may maintain *trover*, after the condition of the mortgage is broken.

By the terms of the contract, the slave was to remain in *Snell*'s possession until the day of payment, when, if the money was not paid, with interest, it should be lawful for the plaintiff to take possession of, and sell the slave in satisfaction of the debt. But if the debt was satisfied at the day, the sale should be void. The writing was not sealed, but only signed by *Snell*. It was stated that the debt was unsatisfied after the day appointed for the payment thereof; and the plaintiff contends, that by the legal operation of the contract, the mortgagee became proprietor of the slave, liable to the equity of redemption. Upon this statement, the paper was offered in evidence to prove property in the plaintiff, and was rejected by the court; in consequence of which the nonsuit was ordered.

Noll, J. This was an action of *trover*, to recover a negro slave, tried before judge *Smith*, at Orangeburgh. The plaintiff had taken a mortgage of the negro in question from one *Snell*, redeemable upon the payment of a certain sum of money, on a future day. *Snell* continued in the possession of the negro, and previous to the day of payment, sold him to the defendant. The presiding

judge granted a nonsuit, on the ground that the mortgage did not vest such a legal right in the plaintiff as entitled him to maintain this action. I am, however, of opinion, that such a right did vest in him, and therefore the nonsuit ought to be set aside. Every mortgage, *prima facie*, conveys a legal right to become void, on a condition subsequent, which it is incumbent on the mortgagor to prove. Whether the want of delivery, or any circumstances attending the transaction, afforded such presumption, or evidence of fraud, as would prevent the plaintiff from recovering on the merits, should have been submitted to the jury, but could not have been taken advantage of by way of nonsuit. The motion, therefore, ought to be granted.

Colcock, J. On the argument of this case I was inclined to think that the opinion of the court below was correct, and that the mortgage should not have been given in evidence. But, on farther consideration, I am induced to think a mortgagee may maintain his action of *trover* against a third person.

In England, the mortgagee may maintain his action even against the mortgagor. *Ruch v. Hall*, Doug. Rep. 22. ; *Birch v. Wright*, 1 Term Rep. 382. 3. And after the stat. 4th of Ann, which does away the necessity of attornment, he may maintain his action or distress for rent against a tenant. *Mors v. Gallimore*, Doug. Rep. 279. But by our act of assembly, the right of the mortgagee to maintain ejectment against the mortgagor is taken away. Vol. 1. p. 65. It appears to me, if this remedy is not given, that the mortgages of personal property would be wholly ineffectual. In the case of *Atkinson v. Maling and others*, 2 T. Rep. 462., the ship, which was recovered by the plaintiff, was at sea when mortgaged, and, of course, no delivery could be made. It seems to be conceded, that the mortgagee is considered as being in possession from the execution and delivery of the mortgage, in the same manner that the assigns of a bankrupt are considered to be in possession of the goods of the bankrupt assignee, and may maintain *trover* for the recovery of them. 7 Term. Rep. 312. The mortgagee is the absolute and true owner. 3 Cranch's Rep. 140. 144. *Ryall v. Rowles*, 1 Ves. I am, upon these authorities, and for these reasons of opinion, that the motion be granted.

Bay, J. Upon the argument of this case, I was rather inclined to think, that the right of property was not absolute in the mortgagee till after a foreclosure, or a sale under the mortgage, which in this country has been considered as tantamount to a foreclosure. But upon reconsidering this case, I am now very clearly of opinion,

that upon failure of payment of the money, or performance of the condition in the mortgage, the property becomes absolute in the mortgagee. Before the failure of payment of the money mentioned in the proviso, the legal estate is still in the mortgagor, and only a conditional one in the mortgagee. But after failure of payment of the money, it is no longer conditional in the mortgagee, but absolute ; and is gone in law from the mortgagor forever ; subject, however, in equity, at any time before foreclosure, to the right of redemption, upon payment of principal and interest of the mortgage money. 2 Black. Com. 158.; 3 Ba. Abr. Tit. Mortgage, 635. Taking it then for granted, that the property is absolute in the mortgagee after failure, it follows as a natural consequence, that he may pursue his property wheresoever he can find it ; for the right of property gives the right of remedy, and he may take it out of the possession of the mortgagor himself, or out of the possession of any other person who may have it by transfer or sale, if he can procure such possession peaceably ; or, upon demand and refusal, may maintain an action of *trover* for it ; for he who has the first mortgage shall prevail over all other mortgages or conveyances whatever. Eq. Cas. Ab. 320.; 3 Bac. Abr. 642.

The civil law is very full upon this right of the creditor, to pursue the thing mortgaged in the hands of any person in whose possession it may be found. 1 Domat, 343. &c. And the common law in this respect is borrowed from the civil law. It has been the custom, from time immemorial, in this country, for the mortgagee, after failure of payment of the money mentioned in the proviso, to seize the negroes, or other chattels, and, after duly advertising, to sell them towards payment and satisfaction of the debt.

And, indeed, this custom seems to have given rise to the common covenant in almost every mortgage deed, to empower the mortgagee to seize and sell, and to return the overplus, if any, to the mortgagor, which, in fact, is only a declaration of the common law right which would exist without it. And, although it is usual and common to put such mortgages into the hands of the sheriff, to seize and sell, yet he only acts as the agent of the mortgagees, and not in his official capacity of sheriff. This custom, however, is a very commendable one, as the sheriff of a district is always supposed to be highly trustworthy, and a very proper person to conduct such sales. Upon the whole, I am of opinion that the non-suit should be set aside, and a new trial granted. The other judges concurred.

18.

HOPKINS v. THOMPSON June T. 1835. 2 Porter's Rep. 433.

Detinue lies by the mortgagee of personal property after the time of redemption has expired against a third person.

Detinue by Hopkins, the mortgagee, of certain slaves, against Thompson, a purchaser under an execution against the mortgagor.

The court charged the jury that an action of detinue was not sustainable to recover possession of the slaves without a foreclosure of the mortgage. Judgment for defendant.

Per Cur. Hitchcock, J. There can be no doubt but that detinue does lie to recover personal property mortgaged after the time for redemption of the mortgage has expired. By the mortgage, the legal estate, as between mortgagor and mortgagee, is vested in the latter, and he has the right to recover the possession of the property for the purpose of subjecting it to the payment of his debt; and he may proceed either at law or by bill in equity.

19.

HART v. REEVE March T. 1818. 5 Haywood's Rep. 50.

The mortgagee can not follow the goods mortgaged into the hands of the *bona fide* vendee of the mortgagor.

Held by the court, that where personal property (slaves) were mortgaged and left with the mortgagor, and were disposed of by him to an innocent purchaser, the mortgagee could not follow them, the mortgage not having been registered in time.

20.

YOUNG v. FORCEY et al. May T. 1817. 4 Haywood's Rep. 11.

The hirer or mortgagee must furnish necessities to slaves.

Held by the court, that the mortgagee, or hirer of slaves is in the place of the master or owner, and must supply necessities, including medical aid, and such as a good master ought to furnish. So, also, during a temporary sickness, running away, and other casualties, which the absolute owner would be liable to, before hiring or mortgaging, the temporary hirer must sustain the loss.

(X.) OF DOWER OF SLAVES.*

1.

McCARG'S EX'R V. CALLICOTT. March T. 1811. 2 Munf. Rep. 501.; AMBLER AND WIFE V. NORTON, 4 Hen. & Munf. 23.

Declaration in detinue for slave by the executor of the testator, whose widow is the defendant. The widow was possessed of the slaves, as her thirds of the slaves of her former husband; and being so possessed, the plaintiff's testator married her, and died. And the question was, whether a widow holding slaves in dower, and marrying again, thereby vests them in her second husband, so that upon his death they go to *his* representatives, or whether she shall have them for the residue of her life. The county court gave judgment for the plaintiff; and on appeal, the judgment was reversed by the district court, and the plaintiff appealed to this court.

Where a widow holding slaves as dower marries a second husband, the slaves belong to the second husband and his representatives until her death.

The president delivered the opinion of the court, consisting of judges *Fleming, Roane, Cabell* and *Coalter*, that the judgment of the district court be reversed, and that of the county court affirmed.

* Slaves are subject to dower in all the states. Not only are they subject to dower, but the widow's interest in them is protected by statutory provisions. If the husband manumits his slaves, whereby creditors and the dower of the widow are affected, the manumission is so far ineffectual, that the manumitted slaves may be sold for a period, and the proceeds of the sale applied to the creditors of the former owner and his widow. By the Rev. Code of Virg. vol. 1 p. 435., it is declared, that the right of the widow to the dower of slaves emancipated by the husband's will, are saved if she renounce under the will. So, also, the rights of the creditors of the person emancipating are saved. And by the Rev. Code of Mississippi, p. 325, § 75., it is declared, that slaves emancipated are subject to the right of dower of the widow, and are made liable to execution for the previous debts of the owner. And similar provisions exist in the statutes of the other states. Civil Code of Louisiana, art. 190.; 2 Litt. and Swi. 1155.; 2 Brev. Dig. 256.; James' Dig. 398.; Toulmin's Dig. 632.; Prince's Dig. 457.

2.

HYKES & WIFE v. WHITE'S ADM'R. April T. 1832. 7 J. J. Marshall's Rep. 134.

A wife's estate in dower of slaves by a former husband on her marriage, vests in her husband.

Per Cur. Robertson, Ch. J. The only question presented in this case is, whether slaves possessed in right of dower by a *feme* at the time of her marriage survive to her, or constitute (during her life, and after the death of her husband, whom she married whilst she held them as dower in a former husband's estate) a fund for the payment of his debts, and for distribution among his heirs.

The question has been expressly decided by this court, in the case of *Hawkins v. Craig and Wife*, 6 Monroe's Rep. 256. In that case the court decided, that the wife's estate in slaves held as dower from a former husband, at the time of her marriage with a succeeding husband, vests absolutely in the latter during their joint lives; and in the event of her surviving him, goes, during her life, to his personal representatives. They are assets in the hands of the husband's representatives, if he should die before his wife. Slaves held in right of dower vest in the second husband, and do not survive to the surviving wife, but vest in the representatives of the second husband during the life of the widow, subject only to her right of dower, as part of her husband's estate. And see *Fightmaster et al. v. Beasley*, 7 J. J. Marshall's Rep. 410. The court said that the interest of a wife in the devise of a slave vests absolutely in the husband.

3.

THRIFT v. HANNAH et al. June T. 1830. 2 Leigh's Rep. 300.; S. P. GIVENS v. MANNS, 6 Munf. Rep. 191.; LEWIS v. FULLERTON, 1 Rand's 15.

And her right to manumit them is gone.

Rachel Magruder, being a *feme* sole, on the 25th of Nov. 1798, made a written instrument of manumission, to take effect *in futuro*, of certain slaves, Hannah, Kate and others, which instrument is attested by two witnesses, and partly proved by one of them, and continued for further proof in April, 1799. In November, 1799, Rachel Magruder married Thrift, having the negroes in her possession, who was ignorant of the deed of emancipation. Thrift and his wife moved into another county, taking the negroes with them, and holding them as slaves. Mrs. Magruder died in 1811. In 1819 the instrument of emancipation was fully proved. The husband holding the negroes in his possession as slaves, this suit

was commenced. Verdict for plaintiffs ; and Thrift appealed to the Circuit Court of Albermarle, which affirmed the judgment, and he appealed to this court.

The court held, that under the statute, an instrument of emancipation is ineffectual to confer freedom till full probat be made, and takes effect from that act. And in this case, as the rights of the husband attached to the property before the probat, the subsequent full probat did not relate back and divest or effect those rights.

Per Cabell, J. By the marriage of Rachel Magruder in this case, she ceased to be the owner of the slaves, which thereby became the property of her husband ; and that event happened before the proof of the instrument ; and, of course, before it had taken effect as an instrument of emancipation, it could not take effect afterwards, since none but the owner of the slaves can emancipate them.

(XI.) OF THE DIVISION OF SLAVES.*

1.

FITZHUGH et Ux. v. FOOT et al. April T. 1801. 3 Call's Rep. 13.

Held by the court, that an equal division of slaves, in number and value is not always possible, and sometimes improper, when it cannot be exactly done without seperating infant children from their mothers, which humanity forbids, and will not be countenanced in a court of equity ; so that a compensation for excess must, in such cases, be made and received in money.

When a division cannot be made without separating infant children from their mothers, compensation may be made in money.

2.

JACKSON v. MACY. Spring T. 1808. Hardin's Rep. 582.

Held by the court, that in a suit for the division of slaves, the court upon a proper case made out, may order the sheriff to take the slaves into his possession and hire them out.

And the court will order the sheriff to hire them out.

* By the Rev. Code of Mississippi, p. 50., slaves descending from an intestate may be sold by order of the Orphan's Court, where equal division cannot be made ; and persons holding life estate in slaves, or guardians for infants are required to deliver a list of slaves to the Register of the Orphan's court, and also the increase. Page 51. And similar provisions exist in the other states for the division of slaves.

3.

SNEED v. EWING & WIFE. April T. 1831. 5 Marsh. Rep. 481.

And they will be divided according to the laws of the owner's domicile.

Held by the court, *Robertson, J.*, that slaves in Kentucky cannot be carried to, and held in a state where slavery is not permitted, (Indiana;) yet slaves in this state which belong to a citizen of such a state, on his death will be distributed according to the law of distribution of personal chattels or moveables in that state.

(XII.) OF REMAINDERS IN SLAVES.*

1.

HOLIDAY v. COLEMAN. March T. 1811. 2 Munf. Rep. 162.

The court will, in its discretion, compel the tenant for life to give security to the remainderman.

The court held, that the power of a court of equity to rule a tenant for life of slaves, or other personal property, to give security that the property shall be forthcoming at his or her death, is to be exercised, not as a matter of course, but of sound discretion, according to circumstances.

2.

BANK'S ADM'R v. MARKSBURY. Spring T. 1823. 3 Little's Rep. 275.

A devise to take effect after the death of the deviser is good.

Held by the court, that a gift of slaves by a father to his children, to take effect after the death of himself and wife, and not until then, is valid.

* Slaves are considered as personal property, except in Louisiana, and under statute of descents in Kentucky. They may be devised, and limited in the same manner as other personal property. A remainder may be limited of them. *Keating v. Reynolds*, 1 Bay's Rep. 80. Even after an absolute gift to the first legatee. *Smith v. Bell*, 6 Peters' Rep. 66. And see *Dott v. Cunningham*, 1 Bay's Rep. 453., as to when the words, "heirs of the body," will be considered words of limitation or words purchase; and consequently, when the contingency will be too remote. The contingency must happen within a life or lives in being, and twenty-one years and a few months after. *Barnit's Lessee v. Casey*, 7 Cranch's Rep. 456.; *Doe v. Walton*, 2 B. & P. 324.; *Thelluson v. Woodford*, 1 N. R. 357.; *Long v. Blackall*, 7 T. R. 109.; *Roe v. Jeffrey*, 7 T. R. 589.; *Morgan v. Morgan*, 5 Day's Rep. 517.; *Anderson v. Jackson*, 16 John's Rep. 382.; *Scott v. Price*, 2 S. & R. 59.; *Dallam v. Dallam's Lessee*, 7 Har. & Johns. Rep.; 220.; *Ewings v. Reynolds et al.* 3 Har. & Johns. Rep. 144.

3.

QUARLES' EXECUTOR V. QUARLES. March T. 1811. 2 Munf. Rep. 321.

Held by the court, that where slaves are specifically bequeathed to a child when he or she shall attain the age of twenty-one years, or shall marry, and no provision is made expressly for maintenance in the mean time, the intermediate profits of the slaves, if not otherwise disposed of, do not pass by a general residuary clause, but go to the legatee for his support; and he is entitled to the profits from the time of the receipt thereof by the executor, if there be no good cause appearing for his failure, to apply the principle to the use of the legatee. And see *Medley v. Jones*, 5 Munf. Rep. 98. 101.

The profits of slaves devised to a child when he shall arrive at age, do not go to the residuary legatee, but to the child for his support.

4.

MEDLEY V. JONES. March T. 1816. 5 Munf. Rep. 98.

Held by the court, *Roane, J.*, that a person entitled to a remainder in fee, expectant upon a life estate in slaves, taking them into his own possession to prevent the tenant for life from carrying them out of the state, is bound to account for and pay their hire, or the profits, while he detains them, and is not entitled, upon the ground of the tenant's refusing to give bond and security for their production at the expiration of the life estate to an injunction, to stay proceedings upon a judgment against him for such hire or profits.

A person in remainder, taking possession of slaves, must account to the particular estate for the hire or profits.

5.

BANK'S ADM'RS V. MARKSBERRY. Spring T. 1823. 3 Little's Rep. 275.; S. P. EWING'S HEIRS V. HANDLEY'S HEIRS, 4 Little's Rep. 346.

Samuel Marksberry, by deed, for the consideration of love and affection, granted a negro wench to his son Samuel, and the issue of the said wench to his daughter Rachel. After his decease, Rachel intermarried with Banks, and had children, of whom the plaintiff was one. Rachel died, and afterwards, the donor, her father, died, and the plaintiff, one of the children of Rachel, took out letters of administration upon her estate, and commenced this suit. The court held, the administrator of Rachel had no right to recover; that the property in the issue of the negro Pen vested in the husband on the marriage; and the plaintiff appealed to this court.

Where a *feme sole* is entitled to slaves in reversion or remainder, and marries before the termination of the particular estate, the right to the slaves belongs to the survivor of them.

Held by the court, that slaves, while in the possession of the tenant for life of them, are not choses in action of the reversioner in fee, because the possession of tenant for life is not adverse to, but consistent with his title. Rachel had, in fact, the general, and the donor only a special property in the slaves. The right to the slaves in question survived to the husband of Rachel, and, of course, the plaintiff in the circuit court showed no right to maintain the action. From an attentive examination of the cases, the clear result from all of them seems to be, that if a *feme sole* be entitled to slaves in remainder or reversion, and marry before the determination of the particular estate, the right will go to the husband or the wife, as the one or the other may survive. And according to that doctrine, it is obvious, as the husband survived in this case, the right to the slaves in question must belong to him. Judgment affirmed.

6.

BELL & WIFE v. HOGAN. July T. 1828. 1 Stewart's Rep. 536.

Where the devise was to the daughter for life, and if she leaves heirs of her body, then to such heirs for ever; and for want of such heirs, then to testator's four children; the remainder to the children is not too remote.

Detinue for slaves. Bell and wife brought an action to recover twelve negroes under the will of Thomas B. Whitmell, which was in these words: "I lend to my daughter, Elizabeth West Whitmell, six negroes, (naming them,) and their increase during her natural life; and if my daughter should leave an heir or heirs, lawfully begotten of her body, I then give to the said heir or heirs so begotten, the said six negroes, and their increase, to them and their heirs forever. And for want of such heirs, my will and desire is, for the above-named six negroes and their increase to be equally divided among my four children, (naming them,) and their heirs forever."

Elizabeth married, and took possession of the six negroes; and after the testator's death intermarried with the defendant. Two of the testator's children released to their sister Elizabeth. The plaintiff's wife being one of the children, Elizabeth, the devisee, died without ever having had any children.

The court charged the jury, that the bequest to Elizabeth was a limitation over, after an indefinite failure of issue, and therefore void; that the limitation over being void, the first legatee took an absolute estate; that if said Elizabeth was entitled only to a life estate, that then, at her death, the property in the slaves would revert back, and sink into the residuum of the testator's estate undisposed of by his will. Plaintiffs excepted.

Per Cur. Lipscomb, Ch. J. It is a rule of law, that a limitation

over to another, after an indefinite failure of heirs, is bad, because it is too remote. If the testator in the case under consideration meant, in his limitation over to the plaintiff, and her brothers, that it should not take effect until there had been an indefinite failure of heirs, we cannot carry his intention into effect; and the charge of the court was correct, that it was too remote, and that Elizabeth, the first taker, took an absolute estate. But if we are authorized, from the terms of the bequest, to believe that an indefinite failure of heirs was not meant, and that by "failure of heirs," he meant heirs of a particular kind, then his intention is not opposed by the rule of law, and should be carried into effect. This limitation was not too remote, because it was to take effect, if at all, at the death of the first taker. And the court referred to *Peek v. Pagden*, 2 D. & E. 721.; *Porter v. Bradley*, 3 D. & E. 143.; *Wilkinson v. South*, 7 D. & E. 551.; *Sheers v. Jeffries*, 7 D. & E. 585.

7.

BETTY V. MOORE. Spring T. 1833. 1 Dana's Rep. 235.

Suit for freedom. Betty claimed to be free under the will of Jeremiah Moore, who willed, that after the death of his wife Judith she should be free. Frank Moore transferred to his sister Judith, Betty, absolutely if she had children; but if his sister died without children, Betty should revert to him. Judith married Jeremiah Moore, the testator, and died without issue. The court instructed the jury, that upon these facts Betty had no right to freedom. Verdict and judgment for defendant.

A sale of a slave, upon condition that if the purchaser die without issue it shall revert or pass to a third party, the condition is void, and the property vests in the first taker.

Per Cur. The judgment must be reversed. At common law, a gift to a man and the heirs of his body was an estate upon condition, that it should revert to the donor, if the donee had no heirs of his body; but if he had, that it should remain to the donee. It was therefore called a fee simple, on condition that he had issue. 2 Black. Com. 110. The statute *de donis* afterwards turned this estate upon condition, when it created the conveyance of real estate into *fee tail*. As to personalty, it still remains a fee on condition. According to the earlier decisions, while chattels were of little estimation, a grant of personalty for life carried with it the whole estate. But the law, as it has been settled in modern times, allows the limitation of a remainder after a life estate in personalty. And it has even been allowed, by executory devise or conveyance in trust, to create what is, to some extent, in effect the same as a conditional fee, or estate tail, in such property, without thereby passing the absolute and entire interest to the first taker. This, how-

ever, is expressly confined to two excepted modes of creating an estate in personalty. For it is well settled, that, (with the exception of an annuity,) wherever by any of the ordinary modes of conveyance, an estate in fee conditional or fee tail is granted in or out personalty, that it passes the whole entire to the grantee or first taker, and consequently, all further limitations or reservations are null and void. Co. Litt. 20. (a) ; Fearn. on Cont. Rem. 460. 463 ; Roper on Leg. 393. So that, properly speaking, there can be no such estate in personalty as a fee simple, on condition of having issue, or fee tail, but all such estates, when attempted to be created, carry the whole interest.

8.

SMITH V. BELL AND WIFE. July T. 1827. Martin & Yerger's Rep. 302.

Where the first taker takes an absolute estate, a subsequent limitation is void.

The testator devised as follows : " I give to my wife, Elizabeth, all my personal estate whatsoever, and of what nature, and quality, and kind soever, after paying my debts, legacies and funeral expenses ; which personal estate I give and bequeath unto my said wife, Elizabeth, to, and for her own use and benefit, and disposal absolutely. The remainder of said estate, after her decease, to be for the use of my son Jessee." The bill charged, that Elizabeth married the defendant Bell, who took the estate consisting principally of negroes. Jessee, the son, assigned to the plaintiff all his claim and interest in the personal estate of his father after the death of the widow. The chancellor dismissed the bill.

Per Cur. Catron, J. The decree must be affirmed. Where the first taker has an absolute estate in the property devised, then the limitation over is void, being inconsistent with the interest given to the first taker.

9.

HIGGINBOTHAM V. RUCKER. April T. 1800. 2 Call's Rep. 313. 319.

A devise to the heirs of the body.

Held by the court, that where a father makes a gift of slaves to his daughter, and the heirs of her body, and in case she die without issue, that is, children of her body, the said slaves shall return to the grantor, the limitation is not too remote, and is therefore good. It is a clear principle, that a limitation of personal estate, after an indefinite failure of issue, is void as tending to a perpetuity ; but, it

is also a principle, that with respect to personal estate, the courts incline to lay hold of any words, which tend to restrict the generality of the words "dying without issue" to mean "dying without issue living at the death." Thus a limitation to a person in issue for life, after dying without issue is good, because the contingency must happen, if at all, in the life time of the remainderman; and the limitation to him for life, restrains the generality of the words, "dying without issue;" otherwise the limitation over would be void. See *Dunn v. Bray*, 1 Call's Rep. 338.; *Timberlake and Wife v. Graves*, 6 Munf. Rep. 174.; *Gresham v. Gresham et al.*, 6 Munf. Rep. 187.; *Didlake v. Hooper*, Gilmer's Rep. 194.; *Bradley v. Mosby*, 3 Call's Rep. 50.; *Pleasants v. Pleasants*, 2 Call's Rep. 320. (2d ed. 270.)

10.

DUNN AND WIFE v. BRAY. Oct. T. 1798. 1 Call's Rep. 338.

Held by the court, that where the testator devised certain slaves to his son W. "and his heirs for ever, but if he should die and leave no issue, then to his son C.," the limitation to C. is good, and not too remote. See *Shaw v. Clements*, 1 Call's Rep. 429. And in the case of *Royal v. Eppes*, Adm'r of Royal, 2 Munf. Rep. 479., the clause in the will was, "it is my will and desire, that in case my son John should die without heir of his body lawfully begotten, that then, and in that case, I give to my wife Lucy, and to her heirs forever, all the negroes which I had by her," the court held it was a good executory devise in favor of Lucy; not on the ground, that the word "then" was used; or the word "heir," in the singular number; but because the bequest was of the negroes the testator *had by her*, (saying nothing of their issue,) and this was considered as evincing that he did not intend a return of them, or their posterity, to his wife, at any remote period of time.

So where he makes a devise to W. and his heirs forever.

11.

KEEN et al. v. WEST. Spring T. 1813. 3 Bibb's Rep. 39.

Held by the court, *Owsley J.*, that where A. gives slaves to B. for life, with remainder to the children of B.; the remainder is good. In the case of *Higginbotham v. Rucker*, 2 Call's Rep. 313., it was decided that the gift of a slave to one for life with remainder to his children, was a good limitation. We think, by the rules of common law, as they are recognized and known, both in England and in this country, a personal chattel may be granted to one for life, with remainder to another, either by will or deed.

The rules of the common law as to remainder in slaves prevail.

12.

JOHNSON v. SEVRER'S EX'RS. June T. 1830. 4 Marshall's Rep. 141.

Rule of recovery by the remainder man.

Held by the court, *Underwood, J.*, that the amount of recovery by a remainderman, against the vendee of the owner for life, who sells the fee simple of the negro, is not the criterion of damages in a suit by such vendee against his vendor in a covenant of title; but the value of the slave at the time he is demanded by the remainder claimants, after termination of the life estate, with interest on that value, and costs of suit, are the proper measure of the warrantor's responsibility.

(XIII.) INCAPACITY OF SLAVES.

(A.) TO MAKE A CONTRACT.*

1.

FREE LUCY, AND FRANK. Fall T. 1826. 4 Monroe's Rep. 167.; EMMERSON v. HOWLAND, 1 Mason's Rep. 45.

A slave can make no contract.

The court held, that contracts made by negroes while in slavery, do not bind them after they are liberated; and, consequently, a plea by a free negro, that a writing sued on was delivered when he was a slave, is good.

* One general principle predominates in all the states, and in the British, Spanish, and Portuguese West Indies, and that is, that a slave cannot make a contract. 1 Maryland Rep. 561. 563. Not even a contract of matrimony, *Ibid.* Stephens on Slavery, &c. p. 59. 60. *Wraxall's Memoirs*, Vol. 2. letter 21. And in many of the states this principle has become part of the statute law. See *James' Dig.* 385, c.; *Prince's Dig.* 453.; 2 *Litt. & Swi. Dig.* 1159.; *Haywood's Manual*, 525.; *Mississippi Rev. Code*, 379.; *Martin's Dig.* 616. And it is stated in *Goodwin on Slavery*, p. 43., that a slave cannot acquire property. And the same principle is stated in "*Bickell's West Indies as they are*," p. 66.; *Niles' Reg.* vol. 17. p. 200; *ibid.* vol. 20. p. 273.

(B.) TO TAKE BY DEVISE, DESCENT, OR PURCHASE.

1.

BYNUM v. BOSTWICK. June T. 1812. 4 Dess. Rep. 266.; S. P. Dulany's opinion, 1 Har. & M'Hen. Rep. 561.

Per Cur. Dessausseure. The question is, whether the devise to trustees, in trust for the devisor's negro slave Betsey and her three children, are valid devises, and can take effect:

Cannot take effect by descent, or purchase.

The condition of slaves in this country is analogous to that of the slaves of the ancient Greeks and Romans, and not that of the villeins of feudal times. They are generally considered, not as persons, but as things. They can be sold or transferred as goods, or personal estate, they are held to be *pro nullis, pro mortuis*. By the civil law, slaves could not take property, by descent or purchase,* and I apprehend this to be the law of this country. Cooper's Just. 411.; Taylor's Element of Civ. Law. 429.

2.

THOMAS CUNNINGHAM'S HEIRS v. THE EXECUTORS OF THOMAS CUNNINGHAM. 1801. Cameron & Norwood's North Carolina Rep. 353.

Thomas Cunningham, in September, 1792, duly made his last will and testament, by which, amongst other things, he devised as follows: "It is my will and desire, that five feet of an alley be left from Front street to low water mark, as convenient as may be to after bequeathed lot, then I will and desire that forty feet back including the house where Mr. Potts is now resident, be, at the expiration of the lease, rented out for the maintenance of a negro woman of mine, named *Rachel*, and the maintenance and education of her three mulatto children, named *Mary*, *Ritty*, and *Christy*, and the child of which she is now pregnant." After devising part of a lot to Edmund Robeson, the will proceeds thus: "and the rest and residue of the said lot to be rented yearly for the mainte-

A slave cannot hold property by devise.

* Slaves cannot take property by devise, descent, or purchase, as was stated. See ante, p. 6. It is a general principle, and prevailed in the Spanish, Portuguese, and British West Indies, before the late act of emancipation. See Stephens on Slavery, &c. vol. 1. p. 46, 47.; 17 Niles' Reg. p. 200. And see a pamphlet published by Robert Walsh, Jr., Philad.; Holmes' Annals, No. 1.

nance of *Rachel* and her three children already named, with the child of which she is now pregnant; with all the rest of the land lying between Lee's Creek and Deep Inlet Creek, between *Rachel* and her three children, share and share alike, to them and their heirs.

"Item. I will and desire that my negro men. *Virgil* and *Quash*, together with my negro woman *Tamer*, should live on the plantation where I now reside, on Lee's Creek, to work for the maintenance of *Rachel*'s children, during the natural life of said negroes. Item. I will and desire that *Rachel* and her children should be set free immediately after my decease."

The defendant, as executor of Thomas Cunningham, the testator, took possession of that part of the real estate, the rents of which are directed by the will to be applied towards the maintenance and education of the negro woman *Rachel* and her children. For this part of the estate, the action was brought. *Rachel* and all her children, before, and at the time of making the will, and ever since, have been slaves.

Hall, J. I think that the devise in question is void, and cannot take effect. The maintenance and education of some of the devisees, is what the testator appears to have been anxious for. How can it be effected? They are slaves, and their owners have a right to them and their services; if they are educated, it must be by his permission, and if it is attempted without, it is a violation of his right. If this property had been conveyed in trust for the same purpose, a performance of the trust could not be compelled in a court of equity, for the same reason. Admit that they could bring a suit to recover this property, could they have a right to enjoy it? Suppose the owner took it from them, would they have a remedy against him? They certainly would not.

Taylor, J. The intention of the testator seems plainly to have been, to transfer the beneficial interest in the lands, to *Rachel* and her children; and were there no legal impediments to the effecting of such an object, I should think the words made use of equivalent to an express devise of the land. But it is indispensable to the validity of every devise, that there be a devisee appointed who is competent to take. Slaves have not that competence; for a civil incapacity results from the nature and condition of slavery. And it would be a solecism, that the law should sanction or permit the acquisition of property by those from whom it afterwards with-

holds that protection without which property is useless. From this principle an important difference arises between slavery, as it is established in this state, and the condition of villeinage, as it existed in England, prior to the statute Car. 2. A villein might bring an action against any person who did him an injury, except his lord; and even against him in some particular cases. If, therefore, he purchased land, although the lord might enter upon it, and seize it to his own use; yet while he permitted the villein to hold, the land would descend to the children of the latter, in a regular course of descent, and the law, while it furnished them with a remedy against any who should disturb their possession, also gave them, in time, a title by prescription against their lords. A villein might also lawfully dispose of what he had acquired, if he completed the transfer before his lord made seizure.

In all these instances, the characteristics of slavery are different; for a slave can bring no action; he can neither acquire nor transfer property, by descent or purchase; nor will prescription avail him, to assert a title against his master. The devise cannot, therefore, in the present case, operate any thing.

Judges Johnson and Macy concurred.

Judgment for the plaintiff.

(C.) TO BE A WITNESS.*

1.

GEONING v. DEVANA. Feb. T. 1831. 2 Bailey's Rep. 192.

The court were unanimous in sustaining the decision of the recorder of Charleston, that a person of color is not a competent witness, in any case, in the courts of record in this state, although both the parties to the suit are of the same class with himself. And the court go farther, and say, that book entries made by a

A free person of color, is not a witness in the courts of South Carolina, even where the parties are of his own class.

* The court, the Hon. Judge Cranch, in the case of the United States v. Minta Butler, June T. 1813., U. S. Court Washington, held, that a slave was not a competent witness against a free black in a capital case. But free blacks, unless they are in a state of servitude by law, are competent witnesses against free blacks. And his honor decided, in Thomas v. Jameson, MS., that a slave could not be a witness if a free mulatto man be a party. But that a manumitted slave was a good witness against a mulatto. U. States v. Bartow.

free negro, cannot be received in evidence on the oath of a white person to his handwriting. The principal being excluded, that which is accessory, is inadmissible.

2.

WHITE v. HELMES. May T. 1821. 1 M'Cord's Rep. 430.

A free negro is incompetent in any case as a witness where the rights of white persons are concerned.*

Caveat proceeding upon the will of Daniel Leger. The appellants introduced a negro woman, admitted to have been born and bred free, in order to testify as to the testator's capacity to make a will. But the court rejected her as incompetent. The jury found the paper a valid will.

* It may be laid down as a principle, that an African cannot be a witness in a case where the parties are white persons. See the cases in the text. In many of the states, legislative provision is made upon the subject. In Virginia, by an act of Assembly it is declared, "any negro or mulatto, bond or free, shall be a good witness in pleas of the commonwealth, for or against negroes or mulattoes, bond or free; or in civil pleas where free negroes or mulattoes shall alone be parties, and in no other cases whatsoever. 1 Rev. V. C. 422. 3 Hen. stat. at large, 298. And similar provisions are made in Mississippi. See Rev Code, 372.; Litt. & Swi. 1150. So in Alabama, Toulman's Dig. 627., and in Missouri, 2 Missouri laws, 600. In Maryland, see the act of 1717. And in North Carolina, by the act of 1777. ch. 242. And in South Carolina. 2 Brevard's Dig. 242. But the rule does not extend to cases where the parties are negroes or slaves. A slave may be a witness against a slave, and even against a free person of color in some cases. See, in addition to the cases in the text, 1 Rev. Code of Virginia 422.; Prince's Dig. 446.; Haywood's Manual 523.; Maryland laws of 1751. chap. 14 § 4. The principle of exclusion is grounded on the degraded state of the slave, and the interest which he may have to conceal or deny the truth. This rule prevails in all countries where slavery is tolerated. It existed in the British West Indies before the late act of emancipation. See Niles' Rep. vol. 26.; Stephens' West Indian Slavery, &c. p. 168. And prevails, as was before observed, in all the states where slavery exists.

It may be stated as a principle, that in all countries where slavery exists, and where the rules of the civil law have been adopted; and they have been in the Spanish, Portuguese, and British West Indies; and in the several states of the United States, where it is permitted, a slave cannot be a witness for or against a white person in a civil or criminal case. Stephens on West Indian Slavery, &c. p. 163, 169. Dulany's opinion, 1 Har. & M'Hen. Rep. 561. This principle has been adopted in all the states, even where no enactments are to be found declaring them incompetent witnesses. It may be termed the common law or custom, on account of the universality of its operation.

In some of the states the evidence or testimony of free Indians and slaves is admitted, without oath, for or against any other slave accused of any crime or offence. This is specially enacted in South Carolina. 2 Brevard's Dig. 232; and the same regulation may be found in the laws of Georgia, James' Dig. In Virginia, 1 Rev. Code, 422. In North Carolina & Tennessee, Haywood's Manual, 522. And also in Kentucky, 2 Litt. & Swi. 1150.; and Mississippi Rev. Code, 382. And see Stroud's Sketch of Slavery in the several states. p. 126.

Per Cur. Colcock, J. The court are unanimously of opinion, that the witness was properly rejected. There is no instance in which a negro has been permitted to give evidence, except in cases of absolute necessity ; nor indeed has this court ever recognized the propriety of admitting them in any case where the rights of white persons are concerned. When we consider the degraded state in which they are placed by the laws of the state, and the ignorance in which most of them are reared, it would be unreasonable, as well as impolitic, to lay it down as a general rule that they were competent witnesses.

3.

COMMONWEALTH v. OLDHAM. Fall T. 1833. 1 Dana's Rep. 466. ; WILLIAMS v. BLINCOE, 5 Little's Rep. 171.

The question, on error before the court, was, whether a free man of color may, by his own oath, require a white man to give security to keep the peace.

A free man of color may by his oath require a white man to keep the peace.

The court, *Robertson, Ch. J.*, after referring to the act of 1798, 2 Dig. 1150., which declares, that "no negro or mulatto shall be a witness, except in cases in which negroes and mulattoes alone shall be parties ; and 2 Dig. 1251., observed, that the enactment applied only to testimony in suits pending between parties. A free man of color may sue and be sued. When he is plaintiff he may swear for the continuance of the cause ; he may make an affidavit requiring bail ; they are incident to his freedom, and without them he would be virtually disfranchised. And when he is swearing to facts against a white man to compel him to keep the peace, he is not a "witness," but a party swearing to what any other party may.

4.

PILIE v. LALANDE et al. April T. 1829. 19 Martin's Louisiana Rep. 648.

Appeal from the court of the first district.

Per Cur. Porter, J. The second bill of exceptions was to the admission of a witness offered by the plaintiff. The defendant objected to her, on the ground that she was a slave. The court considered the actual enjoyment of freedom by the witness, as *prima facie* evidence of her competency. The bill of exceptions does not state whether she was a negro, or a mulatto. If the latter, the presumption was in favor of her being free, and the court did not err in admitting her.

The presumption of slavery arising from color, is confined to blacks.

5.

GURNEE v. DESSEIS. Aug. T. 1806. 1 Johns. Rep. 508.

A slave manumitted, may prove facts which occurred while he was a slave.

On the certiorari, the error assigned was, that the justice had refused to admit the evidence of a black man, as to facts which occurred while he was a slave.

Per Cur. A free black man is a competent witness to prove facts which may have happened while he was a slave.

6.

EXECUTORS OF ROGERS v. BERRY, May T. 1813. 10 Johns. Rep. 132.

A slave manumitted by an infant may be a witness, although the gift of manumission may be revoked on the infant's coming of age.

Trover for a negro girl. The plaintiff offered a negro man as a witness, and his testimony was objected to on the ground that he was a slave. It appeared the slave had belonged to the testator, who devised him to Walter, his son, and Walter by writing had manumitted him, by and with the consent of his guardian, being himself but 18 years of age when the instrument was executed. The defendant still objected, on the ground that the instrument of manumission, being executed by an infant, was voidable, and the manumission, therefore, not absolute, but revocable. Verdict for defendant, and motion for a new trial.

Per Cur. The manumission by the infant was voidable when he should come of age. The sale, gift, and actual delivery of a chattel by an infant is voidable. Perkins, §12. But, in the mean time, the sale, gift, or transfer, is valid, and the interest which passes, or is released, thereby vests. The manumission being valid, though defeasible afterwards, the witness was not at the time a slave, and the objection to his competency was not well taken. He must be a slave *at the time*, to come within the disqualification prescribed by the statute. The power which the infant had of revoking the gift on coming of age, would, no doubt, have a strong and undue bias on the mind of the witness; but this would be an objection only. He could not be set aside on the ground of a subsisting slave. New trial granted.

7.

THE STATE v. FISHER, July T. 1805. 1 Har. & Johns. Rep. 750.

Mulattoes.

On the trial of the defendant for a felony, *Dorsey*, Ch. J., admitted Rebecca Syntha, a mulatto, born of a manumitted negro woman, as witness. The defendant was convicted; and on laying

the case before the court of appeals, whether the testimony of the mulatto woman was legally received or not, there was such a diversity of opinion among the judges, that no decision was ever given.

(D.) TO BE A PARTY IN A SUIT.*

1.

BERARD v. BERARD et al. Feb. T. 1836. 9 Louisiana Rep. 156.

Per Cur. Martin, J. The plaintiff is a person of color, and sues her aunt, Marie Louise Berard, for the purpose of establishing her and her children's claim to their freedom. The defendant disavowed any title to the plaintiff; but averred, that she belonged to her late sister, Marie Jeane Berard, and that she descended to her sister's natural children, and legai heirs, Celina and Antoine Garidel. These heirs intervened, and claimed the plaintiff and her children as their property, in the right of their deceased mother. The case was tried by a jury, who found a verdict for the intervening party, and the plaintiff appealed.

A slave cannot stand in judgment for any other purpose than to assert his freedom—he cannot contest the title of the person claiming him as a slave.

The court instructed the jury that the intervenors were not bound to show their title. The plaintiff excepted.

On a full consideration of the case, this court is of opinion, that the instructions given to the jury by the district judge, was correct.

* Slaves are themselves considered as property, and can neither take, possess, or retain any, except for the use of their masters. A slave cannot be a party to a suit, except in the single case where the negro is held as a slave, and he claims to be free. See the act of South Carolina, 1740.; 2 Brevard's Dig. 229. And the act of Georgia, 1770. Prince's Dig. 446.; Touhman's Dig. 632.; 1 Missouri Laws, 404. And see the cases abridged, and tit. "Suits for Freedom," post. It would be an idle form and ceremony to make a slave a party to a suit, by the instrumentality of which he could recover nothing; or if a recovery could be had, the instant it was recovered would belong to the master. The slave can possess nothing; he can hold nothing. He is, therefore, not a competent party to a suit. And the same rule prevails wherever slavery is tolerated, whether there be legislative enactments upon the subject or not.

In all cases where the slave alleges he is free, of course he is a party. He may have a *habeas corpus*, and if there be a false return, may sue upon it. Or he may bring trespass for assault and battery, and false imprisonment, to which action, the defendant, to justify himself, must plead the negro is his slave. In many of the states he may proceed by petition for freedom. *Rebecca Renny v. Mayfield*, 4 Hayw. Rep. 165. And see tit. "Suits for freedom," post.

A slave cannot stand in judgment for any other purpose than to assert his freedom. He is not even allowed to contest the title of the person holding or claiming him as a slave.

2.

RUSK v. SOWERWINE. June T. 1810. 3 Har. and John's. Rep. 97.

A free black person is an incompetent witness in a case where the parties are free white christians.

Replevin for a slave. The plaintiff offered a black woman, named Minta, to prove that the slave in question was the offspring of Hannah, who was mortgaged to Daniel Dulany. The defendant objected to her testimony, when the plaintiff offered testimony, that the witness Minta, and the late Benjamin Bannaker, a black man of Baltimore county, were born of the same parents, and were reported to be free; and that their mother was reported to be free, and to be descended from free parentage, and did enjoy freedom. That Bannaker had given evidence on the trial between free white persons, though no objections had been made.

Nicholson, Ch. J., held, Minta was an incompetent witness, the plaintiff and defendant being free white christian persons. The plaintiff appealed, and the cause was argued before *Chase*, Ch. J., *Buchanan*, *Gantt*, and *Earl*, J's., when the judgment was affirmed.

3.

DOROTHEE v. COQUILLON et al. Jan. T. 1829. 19 Martin's Louisiana Rep. 350.

As statu liber has no action for relief for ill treatment.

Appeal from the parish court of the parish and city of New Orleans.

Per Cur. Martin, J. The plaintiff, a free woman of color, complained that her child was directed to be emancipated at the age of twenty-one, by the will of her mistress, who bequeathed her services in the mean while to defendant's daughter, who is still a minor; that the will requires that the child be educated in such a manner as may enable her to earn her livelihood, when free; that no care of her education is taken, and she is treated cruelly. The prayer of the petition is, that the child be declared free at twenty-one, and in the mean time hired out by the sheriff. The answer denies the plaintiff's capacity to sue; that she has any cause of action; and the general issue is pleaded. The petition was dismissed, and the plaintiff appealed. The plaintiff cannot sue for her minor daughter, in a case in which the latter could not sue were she of age. The daughter is a *statu liber*; and as such, a slave till she reaches her twenty-first year. *Clef des loix romaines*

verbi statu liber. As a slave she can have no action, except to claim or prove her liberty. Civ. Code, 177. Her right to her freedom, will not begin till she is twenty-one, if in the mean time the legatee fails to perform the conditions of the bequest, and the heir of the testatrix have the legacy annulled therefor, the *statu liber* must continue a slave in the meanwhile, and her services be enjoyed by the heir; so that the object of the suit, as far as it concerns her, is relief from ill treatment, which a slave cannot sue for. The plaintiff is without a right of action. Judgment affirmed, with costs.

(E.) TO CONTRACT MATRIMONY.

1.

GIROD v. LEWIS. May T. 1819. 6 Martin's Louisiana Rep. 559.

Per Cur. Mathews, J. The only question in this case, submitted to the court, is, whether the marriage of slaves produces any of the civil effects resulting from such a contract after manumission. It is clear, that slaves have no legal capacity to assent to any contract. With the consent of their master, they may marry, and their moral power to agree to such a contract or connection as that of marriage cannot be doubted; but whilst in a state of slavery it cannot produce any civil effect, because slaves are deprived of all civil rights. Emancipation gives to the slave his civil rights, and a contract of marriage, legal and valid by the consent of the master, and moral assent of the slave, from the moment of freedom, although dormant during the slavery, produces all the effects which result from such contract among free persons.

The marriage of a slave has its civil effects on his emancipation, but none before.

2.

OVERSEERS OF MARBLETOWN v. OVERSEERS OF KINGSTON. May T. 1822. 20 Johns. Rep. 1.

Per Cur. Platt, J. It is a rule, that children follow the condition of the mother, where both parents are slaves, and *a fortiori*, it ought to be so where the mother is free, and the father a *slave*. The statute, 2 N. R. 201., merely legalises the marriage, and renders the offspring legitimate. The husband is not *emancipated*, nor is the wife *enslaved* by such a marriage. I am inclined to listen to the suggestions of policy and humanity, which I think dictate the rule, that the children of such marriages shall follow the condition

Marriages, where one of the parties is a slave, is legal, and if the mother be free, the children follow the condition of the mother.

of the free mother, as to all their civil rights and duties, and that she shall have the exclusive custody and control of them as though their father was dead.

(XIV.) MASTERS' AND OTHERS' LIABILITIES FOR
MALTREATING THEIR SLAVES.*

1.

MARKHAM V. CLOSE. Sept. T. 1831. 2 Louisiana Rep. 581.

Master may be convicted and fined for maltreating his slave.

Held by the court, *Porter, J.*, that the infliction of cruel punishment on the slave, by his master, is a criminal offence, and must be punished by a criminal prosecution, and not before a civil tribunal. And after conviction, the fine is to be levied on the offender by the court before whom the conviction takes place.

2.

ALLAIN V. YOUNG. Jan. T. 1821. 9 Martin's Louisiana Rep. 221.

If a slave of a bad character is pursued on suspicion of felony, attempt to seize a gun flies and is killed in the pursuit, the supreme court will not disturb a verdict for the defendant, who killed him.

Per Cur. Mathew's, J. This is a case in which the plaintiff seeks to recover damages to the value of a slave, alleged to have been killed by the defendant. The case was submitted to a jury, who found for the latter, and from the judgment rendered on the verdict, the former appealed. The evidence in the case shows property in the appellant, and the killing by the appellee. The only question is, whether the killing took place under circumstances that justify it. The testimony which comes up with the record is multifarious; but from it we gather the following facts:

* It is stated in Stroud's Sketch of the Laws relating to slavery, p. 35., "that the master may, at his pleasure, inflict any species of punishment upon the person of his slave." This proposition, so repugnant to humanity, is equally opposed to the fact, and also to the law. In those states where there are no enactments upon the subject, the common law would be efficient to protect the slave. Our books are full of criminal prosecutions for cruelty to horses and other animals. And the common law remedy is considered effective without any statutory enactment. And if the slave be considered an animal, still he is under the protection of the law, and acts of inhumanity and cruelty to him, is a public misdemeanor; and the person guilty may be indicted and punished.

that the slave was in the habit of going at large without a written permission from his master; that he was of a bad character, and was killed in the defendant's attempt to arrest him, on a suspicion of his having committed a felony, whilst he was endeavoring to effect his escape, having attempted to seize a gun. The verdict of the jury is general, and decides both the law and facts of the case. It is the opinion of a majority of this court, that the verdict and judgment are correct.

3.

JENNINGS v. FUNDEBURG. Jan. T. 1827. 4 M'Cord's Rep. 161.

Trespass for killing the plaintiff's slave. The defendant with others being in search of runaway negroes, surprised them in their camp, and fired his gun towards them as they were running away, to induce them to stop. One of the negroes, however, was killed by a random shot.

To excuse a trespass for killing a slave, on the ground of accident, it must appear to have been done without the least fault on the part of the person killing.

The court below thought the killing accidental, and that the defendant ought not to be made answerable as a trespasser. The injury must ensue from some unauthorized intermeddling with property, as in the case of Wright v. Gray, 2 Bay's Rep. 214., where the defendant prevailed on a negro boy, without the consent of his master, to ride a race, and the boy was thrown from his horse and killed. But when one is lawfully interfering with the property of another, and accidentally injures or destroys it, he is no trespasser, and ought not to be answerable for the value of the property. In this case the defendant was engaged in a lawful and meritorious service, and if he really fired his gun in the manner stated, it was an allowable act. Verdict for defendant, and the plaintiff appealed.

Per Cur. Johnson, J. To excuse a trespass, on the ground that the injury done was the consequence of an accident, it is not enough that the party did not intend it, but it must appear that it was unavoidable, and without any the least fault on his part; and the books go so far as to say, that, if by any extraordinary degree of circumspection, even greater than is ordinarily practised in the affairs of life, he might have guarded against it, he shall be liable. Which is illustrated by the case where soldiers were exercising with muskets, and in so doing, the defendant, *casualiter et per infortunam et contra voluntatem suam*, in discharging his piece, wounded the plaintiff. The plea was held bad, for a man shall not be excused

of a trespass, except it be committed utterly without his fault. Hamm. N. P. 67. The firing of the defendant, in the manner stated, was rash and incautious.

New trial granted.

4.

RICHARDSON v. DUKES. January T. 1827. 4 M'Cord's Rep. 156. ; S. P. WALLIS v. FRAZIER, 2 N. & M'C. 516.

The proper rule of damages for killing a slave, is the value of the slave to his master at the time of his death.

Trespass for killing the plaintiff's slave. It appeared the slave was stealing potatoes from a bank near the defendant's house. The defendant fired upon him with a gun loaded with buck shot, and killed him. The jury found a verdict for plaintiff for one dollar. Motion for a new trial.

The Court. Nott, J., held, there must be a new trial; that the jury ought to have given the plaintiff the value of the slave. That if the jury were of opinion the slave was of bad character, some deduction from the usual price ought to be made, but the plaintiff was certainly entitled to his actual damage for killing his slave. Where property is in question, the value of the article, as nearly as it can be ascertained, furnishes a rule from which they are not at liberty to depart. The rule does not apply to actions sounding in damages merely, as slander, &c.; there the jury are left in a great measure without any control as to the amount. And see *Athur v. Wells*, 2 Const. Rep. 314.; *Witsell v. Earnest*, 1 Nott & M'C. 182.; *Wise v. Freshly*, 3 M'Cord's Rep. 547.

5.

WITSELL v. EARNEST AND PARKER. January T. 1818.
1 Nott & M'Cord's Rep. 182.

Neither under the statute of 1740, or at common law, can a slave while he is flying from his pursuers be killed; and if he be, the owner may recover compensation for the loss.

The defendants went to the plantation of Mrs. Witsell for the purpose of hunting for runaway negroes; there being many in the neighborhood, and the place in considerable alarm. As they approached the house with loaded guns, a negro ran from the house, or near the house, towards a swamp, when they fired and killed him.

The judge charged the jury, that such circumstances might exist by the excitement and alarm of the neighborhood as to authorize the killing of a negro, without the sanction of a magistrate. Verdict for defendants. Motion to set it aside.

Per Cur. Colcock, J. By the statute of 1740, any white man may apprehend, and moderately correct, any slave who may be found out of the plantation at which he is employed; and if the

slave assaults the white person, he may be killed; but a slave who is merely flying away cannot be killed. Nor can the defendants be justified by the common law, if we consider the negro as a person; for they were not clothed with the authority of the law to apprehend him as a felon, and without such authority he could not be killed. Motion granted.

6.

THE STATE v. E. SMITH AND R. SMITH. Nov. T. 1817. 1
Nott & M'Cord's Rep. 13.

The defendants were convicted of killing a negro, under the act of 1740. P. L. 173. The clause of the act upon which the indictment was predicated, is in these words: "if any *person* shall on sudden heat of passion, or by undue correction, kill his own slave, or the slave of any other person, *he* shall forfeit the sum of three hundred pounds current money." Sentence was pronounced by the judge upon the defendants, "that they pay three hundred and fifty pounds old currency." They paid the fine to the clerk, and took a receipt. After the court had adjourned, the judge ordered the clerk to amend the minutes so as to make the judgment be, that *each* of the defendants should pay the above sum. A rule was taken out to enforce the amended sentence, which was made absolute. Motion to reverse the decision.

The penalty under the act of 1740, for killing a negro, acts upon the *person*, and not on the offence.

Per Cur. Colcock, J. By the statute, the fine is affixed to the *person*, and not to the *offence*; and in this conviction, *each* of the defendants is found guilty of killing. Many of our acts affix the penalty to the *offence*, and say that for every offence the fine shall be paid. If such had been the language of this act, the construction contended for by the prisoners' counsel must have followed; but this act says, *every person* shall pay for the offence, and not that so much shall be paid for *every offence*. It is therefore clear, that *each defendant* is bound to pay the sum of three hundred and fifty pounds currency; and in this construction my brethren concur.

7.

THE STATE v. RAINES. May T. 1826. 3 M'Cord's Rep. 533.

The prisoner was indicted for murder: "for that the said Guy Raines, on, &c. at, &c., in and upon a certain negro man slave, called Isaac, the property of William Gray, then and there being, then and there did make an assault, and the said negro man slave did wilfully, maliciously, and deliberately murder, contrary to the

An indictment under the act for killing a negro, should specify on its face, the

criminal nature and degree of the offence and the facts and circumstances which render the defendant guilty.

act of the general assembly, &c." Verdict, guilty of manslaughter, and motion in arrest of judgment.

Per Cur. Colcock, J. The indictment is defective. It is necessary to specify on its face the criminal nature and degree of the offence which are conclusions of law from the facts; and also the particular facts and circumstances which render the defendant guilty of the offence. And his honor gave five reasons why the charge should be specific; 1st. In order to identify the charge; least the grand jury should find a bill for one offence, and the defendant be put upon his trial for another, without authority. 2d. That the defendant's conviction or acquittal may enure to his subsequent protection, should he again be questioned on the same grounds. 3d. To warrant the court in granting or refusing any particular right or indulgence which the defendant claims as incident to the nature of the case. 4th. To enable the defendant to prepare for his defence in particular cases, and to plead in all; or, if he prefer it, to submit to the court by demurrer, whether the facts alleged, supposing them to be true, so support the conclusion in law, as to render it necessary for him to make any answer to the charge. 5th. Finally, and chiefly to enable the court, looking at the record after conviction, to decide, whether the facts charged are sufficient to support a conviction of a particular crime, and to warrant their judgment; and also in some instances to guide them in the infliction of a proportionate measure of punishment upon the offender.

(XV.) OF THE TRIAL AND PUNISHMENT OF SLAVES.

1.

THE STATE v. BEN, a slave. Dec. T. 1821. 1 Hawk's North Carolina Rep. 434.

Notwithstanding the act of 1741, a slave tried for a capital crime may be convicted on the testimony of a slave, though uncorroborated by pregnant circumstances.

Indictment for burglary, tried before *Badger, J.* In this case, the fact of burglary was proved by the testimony of a white man, a witness, above suspicion; but the only evidence to show any agency therein, on the part of the prisoner, was given by a *slave*, and that evidence was direct and positive. The counsel for the prisoner, contended, such evidence was insufficient to convict the prisoner, because not supported by "*pregnant circumstances.*" The

court instructed the jury, that whatever rules existed on the subject, were rules of reason and prudence, addressed to their sound discretion ; but that there was no positive rule of law which should prevent them, if they believed the testimony of the slave, from finding a verdict of guilty against the prisoner, although his testimony was not supported by other proof. The jury found the prisoner guilty. A motion for a new trial was overruled, and sentence of death passed, from which the prisoner appealed.

Taylor. Ch. J. I have not been able to ascertain in what manner, slaves, accused of capital offences, were tried before the year 1741. The collections of the laws which I have seen, are silent on that subject. But it may be conjectured that the county courts entertained jurisdiction.

Among the very few events, connected with the early settlement of the state, which history has condescended to notice, that of an insurrection of the slaves, in 1738, has come down to us ; and I infer from the period of its occurrence, that it suggested the rigorous and detailed system of police, which was established in two or three years afterwards. Accustomed, as our ancestors were, to the usages of the common law, and its solemnity in capital trials, they were probably impelled by a sense of common danger, and the duty of self-preservation, to vest this extraordinary jurisdiction in three justices and four freeholders, who might be hastily collected at the court house, and proceed to the condemnation and execution of a slave, without indictment, jury, or notice to the owner. Had such a special jurisdiction, so wholly out of the course of the common law, been created without any specification of the sort of testimony it should require, it is to be apprehended that very slight circumstances would have led to a conviction ; more especially in cases of conspiracy and insurrection, trials for which have in our own day produced monstrous injustice. It was a salutary caution, to the triers, not to infer from the unusual mode of trial, that they should be satisfied with weaker evidence than the common law prescribes ; and, since every other form by which the law aims to secure an impartial trial, was withdrawn from slaves, the legislature prescribes that rather more evidence shall be demanded for their conviction, than is in general necessary. Reasoning of this kind occasioned, as I think, the act of 1741 to declare, that the triers should " receive such testimony of negroes, mulattoes, or Indians, bond or free, with pregnant circumstances, as to them shall seem convincing " When the act of 1793 ex-

tended the trial by jury to slaves, I strongly incline to believe that it was a virtual repeal of so much of the above section as differs from the common law rule of evidence; and that conferring the right of trial by jury in open court, does, *ipso facto*, draw after it, as an incident, the common law principles of evidence, and all the consequences of common law proceedings. I do not, however, rest my opinion solely on this ground. It is to be observed, that every time the legislature have touched this subject since the revolution, it has been for the purpose of improving the condition of slaves, more especially in admitting them to the benefit of an impartial trial in capital cases.

The act of 1806, giving the superior courts exclusive jurisdiction of capital crimes committed by slaves, extends to these persons the full benefit of a common law trial, indictment, the benefit of counsel and clergy, and the right of challenge for cause; withholding only the peremptory challenge, which could scarcely have been of any use to them. The first section directs, "that the trial shall be conducted in the same manner, and under the same rules, regulations, and restrictions, as trials for freemen are now conducted." This, it seems to me, is full authority to the superior courts to look at the common law for the rules of evidence, modified as they are in relation to colored persons, by the act of 1777; and I cannot doubt, that the first section, taken together with the repealing clause, does annul the 48th section of the act of 1741. But why should the act of 1816, which does the legislature so much honor, be so construed as to place slaves on a better footing, in respect to evidence, than free persons? On the trial of the latter for a capital crime, sworn to only by one witness, the jury is instructed to judge of the credibility of the witness, and, if they believe him, that one is sufficient to convict, without any pregnant circumstances. Whereas, if the rule of 1741 is still in force, the jury must be told, that however well satisfied they are with the testimony of one witness, or thoroughly convinced of the guilt of the slave, they must nevertheless acquit him in the absence of pregnant circumstances; and this, notwithstanding the previous finding of the bill by a grand jury, and the examination of the case in a way the most favorable to the discovery of truth. If the grand jury cannot find the bill upon the testimony of one credible witness, without pregnant circumstances, nor the petit jury convict, then the trial is not conducted "in the same manner, and under the same rules, regulations, and restrictions, as trials of freemen are now conducted." If criminal

slaves cannot be punished for crimes which are usually committed with the most studied secrecy, but through a species of evidence not always to be had, and which, if obtained, could not deepen the conviction arising from the testimony of a credible witness, it is to be apprehended that a mischievous state of impunity will be the consequence. There is one circumstance tending to show that the legislature of 1802, did not believe the provision of 1741 was in force, for in the act "to prevent conspiracies and insurrections among the slaves," the rule of evidence is re-enacted in relation to these crimes. Now, the act of 1741, made it applicable not only to these offences, but to all others; and if it were not repealed by the act of 1793, must have been in force in 1802. The act last noticed was passed soon after some disturbances had arisen among the slaves in the lower part of the state, and the clause was probably re-enacted for the purpose of tempering that excess which public excitement had produced in the trials for these offences. Upon the whole, I think the conviction is right.

Henderson, J. The act of 1741 erects a court for the trial of slaves, composed of three or more justices of the peace, and four freeholders, and empowers and requires them to take for evidence, the confessions of the offender, the oath of one or more credible witnesses, or such testimony of negroes, mulattoes, or Indians, bond or free, with pregnant circumstances, as to them shall seem convincing, without the solemnity of a jury. As long as this court remained, under any modification, the testimony prescribed by the act remained with it. But when the trial of slaves was transferred, first to the county court, by the act of 1793, and then to the superior court, by the act of 1816, courts proceeding by known and established rules of evidence, the evidence prescribed to the court established by the act of 1741, was not transferred with the jurisdiction, but the rules established in the court to which cognizance of the offence was transferred or given, became the rule of decision; and it is not at all like the case of treason or perjury to which it was attempted to liken it, for in them the rules of evidence are attached to the offence, and will follow its trial to any court; but the rule prescribed to the court, established by the act of 1741, is attached to the court; and is confined to trials in that court, or to a court modified from that. I lay no stress on the words in the act of 1816, "rules, regulations, and restrictions;" it is most probable they relate only to the form of the trial; nor shall I search for reasons which might

have induced the legislature to require *pregnant circumstances* in one court, and not in the other ; or why, by the act of 1802, to punish slaves for *conspiring* to rebel, or make insurrection, or to commit murder, again prescribes the same rules as to the evidence ; and particularly that the testimony of one negro, or person of color, shall not be deemed conclusive or sufficient to convict, without *pregnant circumstances*, thereby strongly implying, that it was considered that the rule of evidence prescribed to the court, established by the act of 1741, was no longer in force ; but I know in practice, the same thing is often for greater caution, re-enacted. I think this case is clear, upon the grounds, that the rule as to pregnant circumstances was prescribed to another court than the one before which this slave was tried ; that the latter court was in existence before the transfer of cognizance ; that at the time of the transfer it had rules of its own, including the rules of evidence, by which it is ascertained the disputed facts ; that by the act of 1777, negroes, Indians, and mulattoes are declared to be competent witnesses against each other, without calling in the aid of legislative intention, arising from other acts. I can see no error in the judge's charge, and no grounds for a new trial. Let the rule be discharged.

Hall, J. Dissentiente. It is proper, in this case, to take a view of all the acts of assembly which relate to it. The act passed in the year 1741, ch. 24. sec. 48., is the first. It declares, that "if three or more negroes or other slaves shall, at any time hereafter, consult, advise, or conspire, to rebel or make insurrection, or shall plot or conspire the murder of any person whatsoever, such consulting, &c. shall be adjudged and deemed felony, and the slaves convicted thereof shall suffer death." It then declares, "that three justices and four freeholders, owners of slaves, are empowered, upon oath, to try all manner of crimes and offences that shall be committed by any slave, at the court-house, and to take for evidence the confession of the offender, the oath of one or more credible witnesses, or such testimony of negroes, mulattoes, or Indians, bond or free, with *pregnant circumstances*, as to them shall be convincing, without the solemnity of a jury." Under this act, the uncorroborated testimony of a slave would not be sufficient to convict a slave of any crime. I do not think that the act of 1777, ch. 2. sec. 42., has any bearing upon the present question. That act only incapacitates negroes, mulattoes, and some other persons, to be witnesses,

except against each other. This act only recognizes their competency, as the act of '41 had done, but it is silent as to the credibility. By the act of 1793, ch. 5., jurisdiction of all offences committed by slaves is transferred to the county courts, and to a jury of good and lawful men, owners of slaves. Nothing is said in this act relative either to their competency or credibility. If the act of 1741 required pregnant circumstances to support the testimony of a slave or negro, until it is repealed, it is still required. I cannot think that transfer of jurisdiction from the three justices and four freeholders, owners of slaves, to the county courts, is, *ipso facto*, a repeal of it. The act of 1802, ch. 17., makes some new regulations as to the offences of conspiracy and insurrection, and declares, that as to them, the testimony of a negro or person of color shall not be deemed sufficient or conclusive to convict the person charged, unless the same shall be supported by such pregnant circumstances as to the jury shall appear convincing. It may be asked, why did the legislature interpose this guard against convictions for conspiracy, &c., when the same guard was interposed by the act of 1741 against conviction of crimes of every description? The question I cannot answer; but I feel myself at liberty to say, that re-enacting in 1802, what was enacted in 1741, is no repeal of the first act. The next law on this subject was passed in the year 1816. New Revisal, ch. 912. This act transfers to the superior court exclusive jurisdiction in all cases where slaves shall be charged with the commission of any offence, the punishment whereof may extend to life, limb, or member, and under the same rules, regulations, and restrictions, as in trial of freemen for like offences. The latter expression, I think, relates to the mode of conducting the trial. It is altogether silent, both as to the competency and credibility of witnesses: that as I apprehend, was left to the law as it then stood; I mean the law of 1741. This case has been likened to the cases of high treason and perjury; and I think not improperly. In each of those cases, two witnesses were necessary to a conviction; and I think it would be required, until altered, upon a transfer of jurisdiction of those offences from one tribunal to another. The only want of resemblance between those cases and the one before us is, that in those cases, and those only, the testimony of one witness is not sufficient to a conviction in the case of freedom; and the testimony of one witness, I mean that of a slave, without pregnant circumstances, is not sufficient to convict slaves of any crime.

It has been argued, that when the superior courts acquired juris-

diction in these cases, the rules of evidence attached to them, as in trials of free persons. I cannot come to the conclusion, that a positive law should be repealed by subsequent laws, in which so little intimation is given of legislative will, that they should have that effect. That the policy of the law of 1741 was founded on a sense of the degraded state in which those unhappy beings existed, no doubt, will be ceded. Being slaves, they had no will of their own, and a humane policy forbade that the life of a human being, (one of themselves) should be taken away upon testimony coming from them, unless some circumstances appeared in aid of that testimony. If this was a just policy, I am not aware, if we were now to examine their condition, that any thing would be discovered so much more favorable to the cause of truth, as to require a repeal of the laws now in force, by the legislature, or a construction of them by the courts, tending to the same end. My opinion, therefore, is, that the rule for a new trial should be made absolute.

2.

STATE V. REED. June T. 1823. 2 Hawk's North Carolina Rep. 454.

An indictment for the murder of a slave, which concludes at common law, is good.

This was an indictment for the murder of a slave, which concluded at *common law*. The prisoner was found guilty, and moved in arrest, because of the insufficiency of the indictment. The motion was overruled, and sentence passed, from which the prisoner appealed.

Taylor, Ch. J. I think there was no necessity to conclude the indictment against the form of the statute, for a law of paramount obligation to the statute was violated by the offence. Common law, founded upon the law of nature, and confirmed by revelation. The opinion I delivered on the *State v. Boon* remains unchanged, to which, and the effect of the act of 1827, as stated in the *State v. Tackett*, (1 Hawk's Rep. 216.) I beg leave to refer, as containing the reasons wherefore, in this case, there ought to be judgment for the state.

Henderson, J. This record presents the question, is the killing of a slave, at this day, a statute or common law offence? And if a common law offence, what punishment is affixed to the act charged in his record? Homicide is the killing any reasonable creature. Murder is the killing any reasonable creature, within the protection of the law, with malice prepense, that is, with a design and without excuse. That a slave is a reasonable creature,

or more properly, a human being, is not, I suppose, denied. But it is said, that being property, he is not within the protection of the law, and, therefore, the law requires not the manner of his death ; that the owner alone is interested, and the state no more concerned, independently of the acts of the legislature on that subject, than in the death of a horse. This is an argument, the force of which I cannot feel, and leads to consequences abhorrent to my nature : yet if it be the law of the land, it must be so pronounced. I disclaim all rules or laws in investigating this question but the common law of England, as brought to this country by our forefathers, when they emigrated hither, and as adopted by them; and as modified by various declarations of the legislature since, so as to justify the foregoing definition. If, therefore, a slave is a reasonable creature, within the protection of the law, the killing a slave with malice prepense, is murder by the common law. With the services and labors of the slave the law has nothing to do; they are the masters by the law ; the government and control of them belong exclusively to him. Nor will the law interfere upon the ground that the state's rights, and not the master's, have been violated.

In establishing slavery, then, the law vested in the master the absolute and uncontrolled right to the services of the slave, and the means of enforcing these services, follow as necessary consequences ; nor will the law weigh with the most scrupulous nicety, his acts in relation thereto ; but the life of a slave being noways necessary to be placed in the power of the owner for the full enjoyment of his services, the law takes care of that, and with me it has no weight, to show that by the laws of ancient Rome or modern Turkey, an absolute power is given to the master over the life of his slave. I answer, these are not the laws of our country, nor the model from which they were taken ; it is abhorrent to the hearts of all those who have felt the influence of the mild precepts of christianity ; and if it is said, that no law is produced to show that such is the state of slavery in our land, I call on them to show the law by which the *life* of a slave is placed at the disposal of his master. In addition, I must say, that if it is not murder, it is no offence, not even a bare trespass. Nor do I think that any thing should be drawn from the various acts of the legislature on the subject. Legislative exposition is good while the system of law thus expounded is in force ; but when the whole system is abandoned, as is done by the act of 1817, exposition should be laid aside. But if the legislative exposition is to have weight, the last

should be received, and the act last mentioned to speak the language of declaration, and not that of enactment. But it is not admitted that the acts prior to the act of 1817, are by any means a clear legislative declaration, that it was no offence to kill a slave anterior to any statutory provision. The first enactment that we have on the subject, is a simple declaration, that if any person shall maliciously kill a slave, he shall suffer imprisonment. From this we are not absolutely to conclude, that the legislature thought that before that time it was no offence; it is quite possible that juries had not applied the principles of the common law in their purity to the offence; for we see the spirit of the times by the legislative act; but that spirit is happily no more. I would mention, as an additional argument, that if the contrary exposition of the law is correct, then the life of a slave is at the mercy of any one, even a vagabond; and I would ask, what law is it that punishes, at this day, the most wanton and cruel dismemberment of a slave, by severing a limb from his body, if life should be spared? There is no statute on the subject; it is the common law cut down, it is true, by statute or custom, so as to tolerate slavery, yielding to the owner the services of the slave, and any right incident thereto, as necessary for its full enjoyment, but protecting the life and limbs of the human being; and in these particulars, it does not admit that he is without the protection of the law. I think, therefore, that judgment of death should be pronounced against the prisoner.

Hall, J. Dissentiente. I dissent from the opinion of the court below in this case. Most of the reasons for this dissent are to be found in the case of the *State v. Boon*, Taylor's Rep. 252. And it is unnecessary here to repeat them.

3.

THE STATE v. JIM, a negro slave. Dec. T. 1826. 1 Devereaux's North Carolina Rep. 142.

The defendant was indicted for an assault, with an intent to commit a rape, on the body of a white female. In making up the

A slave on a trial for a capital felony is entitled to a jury of slave owners.*

* There exists a considerable diversity in the form of the courts or tribunals before whom negroes and slaves are to be tried for crimes. The legislative enactments have for their object, no doubt, facility and convenience. The most ordinary court for the trial of slaves, is composed of justices and freeholders, particularly for the trial and punishment of inferior crimes. In Virginia, offences affecting the life of the slave are tried by the "justices' and freeholders' court." 1 Rev. Code, 428. And a similar

jury, the counsel for the defendant challenged for cause those jurors who were not owners of slaves; which was overruled by the presiding judge. After a verdict for the state, the defendant's counsel moved in arrest of judgment, on the ground that he was entitled to a jury of slave holders.

Taylor, Ch. J. It appears to me, that the act of 1793, ch. 381., extending the trial by jury to slaves, and directing the jury to be composed of owners of slaves, is not repealed by any subsequent law. A twofold consideration dictated the policy of this law, the force of which remains unimpaired by the extension of additional privileges to slaves. It was intended to surround the life of the slave with additional safeguards, and more effectually to protect the property of the owner, by infusing into the trial, that temperate and impartial feeling, which would probably exist in persons owning the same sort of property. That the master would have assurance of an equitable trial by persons who had property constantly exposed to similar accusations, and would not wantonly sacrifice the life of a slave, but yield it only to a sense of justice, daily experience is sufficient to convince us. The property of a man is more secure when he cannot be deprived of it, except by a jury, part of whom at least, have the like kind of property to lose. And this reason, it seems to me, continues to operate with full force, notwithstanding the many humane and valuable provisions which have been subsequently made for the trial of slaves. I am of opinion, that the judgment should be arrested.

tribunal is established in South Carolina. James' Dig. 392. And in Louisiana, by an act passed June 7, 1806. 1 Martin's Dig. 642. But in some other states the ordinary tribunals of the common law have cognizance of offences committed by the slave. This is secured to him in Kentucky by the act of Feb. 10, 1819. *Let. & Swi.* 1164. And a similar principle applies to capital offences in Georgia. Prince's Dig. 450. And the important privilege of trial by jury is secured to slaves in Missouri, by the constitution of that state. The constitution of Alabama secures to the slaves of that state a similar privilege. See 3d article of the constitution of Missouri, and the constitution of Alabama, tit. slaves, § 2. And by the laws of Maryland, act of 1751, ch. 14., trial by jury is secured to slaves in capital cases. And so also in North Carolina, as appears by Haywood's Manual, 532; and also in Tennessee. See Tennessee Laws of 1813.

4.

THE STATE V. CHARITY. Dec. T. 1830. 2 Devereaux's North Carolina Rep. 543.

On an indictment against a slave for a capital offence, the master cannot be compelled to testify.

The prisoner was indicted for the murder of her own child, and was tried before his Honor Judge Strange. On the trial, the master was offered by the prosecution, to prove the confessions of the prisoner. This was objected to by the master, and by the prisoner ; but the objection was overruled, and the witness examined. The prisoner was convicted, and appealed to this court.

Ruffin, J. I do not know that the question made in this case has ever arisen before in this state. Nor have I been able to find a decision of it in any of our sister states. It must be decided, therefore, on general principles. It is a fundamental rule of evidence at common law, that a party to a suit, or one directly interested in the result, is not competent to testify on the side of his interest, nor can he be compelled to testify against it. This rule less frequently applies to public prosecutions than to civil actions ; because it cannot often happen that private rights are directly involved, or can be consequentially affected by verdicts or indictments. But when they are, the rule prevails in one case as well as the other, subject to a few certain exceptions of necessity or statute provision : as in cases of violence on the wife, or of a witness who is entitled to a reward, on a conviction of the offender, upon his testimony. But in other instances, there is no distinction between the effect of a direct interest in criminal or civil cases. A wife cannot testify for one who is a co-defendant with her husband upon an indictment for a riot or conspiracy. A prosecutor, or his wife, cannot give evidence in an indictment for forcible entry, under the statutes of *Henry* and *James*. One charged as accessory, cannot be a witness for the principal, and other like cases. This has never been carried so far as to embrace heirs apparent, or entail, or remaindermen, or masters of apprentices. In the former cases, the interest is too uncertain and remote ; in the latter, there is no legal interest, because there is no *property*. But in the case of master and slave, the interest is direct and immediate. The whole property in the slave is in jeopardy, and the master is liable for the costs in case of a conviction. He is not, it is true, party to the record, in the sense of reversing the judgment for any irregularity in giving him notice ; which is a collateral matter within the discretion of the court, as to the time and mode of proceeding. But his interests are essentially at stake, as much as the life of the

slave is. The rule of exclusion or protection, on the score of interest, must apply in all cases alike, because it is drawn from the known general frailty of our species. The evidence of an interested witness is rejected, because we cannot have confidence, that men in general in that state will tell the truth, and the whole truth. The temptation is too strong for men to be exposed to it ; and the danger of a jury being misled is too great. This applies equally to all cases. I think, therefore, that a master cannot be a witness for his slave. It follows, that he ought not to be forced on the other side. But this suggests another difficulty. The privilege not to testify, upon the ground of interest, is that of the master, and not of the slave. It may be consequently waved by the former. He may himself prosecute, and give evidence against his slave. And since that is certain, I have entertained the most serious scruples against interfering with this conviction. It cannot be presumed that the master would falsely and corruptly destroy his own property. His evidence on the side of his interest may be suspected ; but that against it, cannot be supposed to be stronger than the truth would justify. If so, the prisoner can have no cause to complain. And could I separate her rights from those of the witness, I would do so, and let the verdict stand. But they are so connected, that justice *cannot* be done to the master, without giving the slave the benefit of it. We cannot restore him his property, without yielding her another trial for her life ; nor reverse the judgment for the costs, without reversing it altogether. I therefore conclude, with much hesitation, that as the master did object to be sworn, there must be a new trial. When I speak of the power of the master to wave his privilege and give testimony, I would not be understood as putting the slave's life in the master's hands, and resting it on his mercy. I allude to testimony to facts within his knowledge. When he is called to confessions, a different state of the case may arise, in which the privilege will be that of the prisoner. The confessions may have been made in reference to defence, and as instructions for conducting it ; or being to the master, may or may not be of that voluntary character which the law, not less in wisdom than humanity, requires. Upon those points, not the slightest intimation of opinion is now intended ; for there is not a little difficulty in them, and this case does not require a decision upon them.

The exception of the prisoner does not present an objection to the evidence, upon either of these grounds ; and therefore the

court must take it, that none existed in point of fact; that the confessions were made freely, and not with a view to defence.

Hall, J. The question submitted to the court is one of a complex nature. The rights of the state, of the master, and of the slave, are involved in it. If the offence charged in the indictment has been committed, the state is entitled to redress, by the legal conviction and punishment of the slave. In such case, the master must submit to the loss of the slave, and the slave must submit to her fate. But it is necessary to inquire, whether the rights of either have been violated. First, with respect to the rights of the master. It is a rule of evidence, that a party to a suit cannot be admitted or compelled to give evidence in it, because he is directly interested in the issue of it. The trial throws directly upon a loss or a benefit. He is, therefore, on the score of interest, altogether excluded from giving evidence. It may be taken in the present case, that the master is not a *party in form* to the proceeding. But he is substantially so. He has as great an interest in the issue, as if it was made up in an action of detainee, to which he was a party. The conviction of the slave, is a judgment against him to the amount of her value. In addition to this, he is made liable by the act of 1793 (Rev. Code 381.) for the costs of the prosecution, provided the slave, if a free person, would be liable for them. And there is no doubt, that she would be liable upon conviction.

I therefore think, that the master was so much interested in the case, that he ought not to have been examined as a witness, when objected to by himself. The objection, however, is personal to the master. It cannot be taken by the slave. As to her, the evidence was legal. But to rectify the error as to the master a new trial must be awarded. As to the rights of the slave, were the master to forego his interest, and voluntarily give evidence against her, I am inclined to think, that she might legally object to his giving in evidence any of her confessions made to him, because, by the act of 1793, (Rev. C. 381.) he is authorized to defend her; and because she is his slave, and by various means, against which slavery could make but little resistance, he might extract from her any confessions he pleased.

But upon this part of the case I give no opinion.

Henderson, Ch. J. My concurrence in the opinion of the court, in excluding the master on the ground of interest, is so feeble, that it almost amounts to a dissent. Where pecuniary interest only is at stake, to exclude a witness on the score of interest, however

small, is applying a scale of morality to our nature sufficiently humiliating. But where the life or death of a fellow being is to be the result of the trial, to exclude a witness, because he may have a pecuniary interest, either in preserving or in taking the life of the accused, is attributing to us, frail as we know ourselves to be, more depravity than we are willing, I think, to admit. And the rule, as laid down by the court, as I understand it, excludes the master on the same ground, that of interest, from becoming a witness for his slave; for the rule must be mutual. If he cannot be compelled to give evidence against his slave, because he has an interest in his acquittal, he cannot, if he wishes, or rather is willing, to give evidence for the slave, on the same ground.

I should rather suppose, that the interest at stake, being so entirely different from that which is brought forward to protect the witness from giving evidence, or to exclude him, if willing, is not to be weighed in the same balance with mere pecuniary interest. It is so transcendant in its nature, that its *weight* is not to be ascertained by *mere money balances*. Cases are to be found in which witnesses were objected to, on the score of interest in procuring convictions for the sake of reward. They were admitted because it was said, that the statute giving the reward contemplated them as good witnesses; for the reward is given on condition that they gave, or procured to be given, material evidence on the trial. There are other cases of interest arising under a statute giving them advantages, in which the statute renders them competent. But I know of no case of life and death, where interest *excluded* a witness. These statute cases did not require a further investigation of the principle of the rule of exclusion. They were *admitted*, not excluded. These different kinds of interest were not thrown into the opposite scales of the same balance. I consider indictments under the statute of forcible entries and detainers, as mere civil suits, and the decisions under them as made in civil causes. For the prosecutor, if successful, obtains a writ of restitution. I am inclined to think, but I am by no means satisfied, that the master is a good witness for his slave; and if so, may be compelled to give evidence against him; that is, as to acts, but not as to confessions; and more particularly, as to those made in reference to defence. But I think that they ought to be excluded in all cases of confessions. The master has an almost absolute control over the body and mind of his slave. The master's will is the slave's will. All his acts, all his sayings, are made with a view to propitiate his

master. His confessions are made, not from a love of truth, not from a sense of duty, not to speak a falsehood, but to please his master ; and it is vain that his master tells him to speak the truth, and conceals from him how he wished the question answered. The slave will ascertain, or which is the same thing, think that he has ascertained the wishes of his master, and mould his answer accordingly. We, therefore, more often get the wishes of the master, or the slave's belief of his wishes, than the truth. And this is so often the case, that the public justice of the country requires that they should be altogether excluded. Confessions made to propitiate the good opinion of the gaoler, or to avert harsh treatment, are excluded upon the same principle. I think the case of the master and slave much stronger. The power of the gaoler is temporary and limited ; that of the master permanent and almost unlimited. The public justice of the country loses but little by excluding these confessions ; for confessions of all kinds are very questionable guides to truth. In crimes of any magnitude, they seldom speak the truth. But if I should be entirely mistaken as regards the slave's confessions in general, I think that confessions made in reference to defence certainly cannot be received ; for the master, from his situation, from the duties which the legislature have imposed on him, is the guardian and defender of his slave. It is a moral duty of the highest grade, to see that no injustice is done him. The relation subsisting between them, imposes upon him a load of obligations, and he should not be permitted, even if willing, to disregard them. He is the medium of communication with the counsel in court ; and a fair and free defence cannot be made, if this confidence is permitted to be violated. In the present case, it does not appear what was the object in making the confession. In common cases, the party must bring his case within the law, as if his question regarded the evidence of one who was an attorney, it must be stated that the disclosure related to a case in which he acted as counsel of him who made the confession, and that it related to the cause. In this case I think it is different. *Prima facie*, the confession was made with reference to defence or protection ; for the master is the perpetual defender and protector of his slave. And if it did not relate to defence or protection it should be shown on the other side. At least, in a case of such magnitude to the prisoner, I should be unwilling to consider it as made with a different intent, unless proved to be so. Judgment of the court below reversed, and a new trial granted.

5.

THE STATE v. SUE, a Negro Woman Slave. 1800.

Cameron and Norwood's North Carolina Rep. 54.

The prisoner had been tried on a charge of giving, or procuring to be given, to William Cooke, and several of his family, a poison supposed to be arsenic, with an intent to kill the said persons, and was found guilty of the fact by the jury empaneled and sworn to try the issue. On which conviction the justices present passed the following sentence: "That the prisoner, Sue, is guilty of death under the act of Assembly, in that case made and provided; and that the said Sue, on Monday the 14th of April, 1800, be taken to the place of execution, and between the hours of 11 and 4 o'clock of that day, she be hanged by the neck until she be dead."

Slaves are not liable to be punished with death, in any case where a freeman would not be subject to the same punishment, except by virtue of the act of 1741, ch. 24. sec. 47. The discretion of the court extends to the quantum only, not to the degree of punishment.

The counsel for the prisoner moved and obtained a writ of certiorari; in consequence of which the prisoner, together with the record of her trial and conviction, and of the sentence passed thereon, were brought up to the superior court.

Johnson, J. It does not appear to me from any construction which I can make of the laws of this state, respecting the punishment of slaves, that they are made liable to be punished with death, in any case where the like punishment is not by law to be inflicted on a freeman; except only in the cases mentioned in the 47th section of the act concerning servants and slaves, passed in the year 1741. I cannot prevail on myself to adjudge, in any case, that a crime shall be punished with death, unless there is an express law for that purpose; and am of opinion, that no implication, however obvious, can be admitted in such case, and that the discretion allowed in these cases, must apply to the *quantum or measure*, not the degree of punishment. Therefore, it is my opinion, that the judgment be reversed, and that the prisoner be remanded to receive such other punishment, *short of death*, as the court who tried her shall think just, so that the same be warranted by the laws and constitution of the state.

Taylor, J. In ascertaining the true construction of the act, it is necessary to take into view some others which have been made relative to the same subject. The whole are founded on a principle of severe policy, absolutely necessary to guard society against the evil consequences resulting from the condition of slavery. Where some offences had been previously provided against, in an act passed the same session, one perhaps at that time of frequent occurrence, in the nature of a conspiracy by three or more, to

rebel or murder, is by this act made punishable with death. The next clause requires, that upon a slave being convicted of any *other crime or misdemeanor*, such judgment shall be passed, according to the discretion of the court, as the nature of the crime shall require. These expressions do, in my opinion, give the court a power to inflict any punishment upon any crime or misdemeanor, where a specific punishment had not been previously directed by law. In such cases the prescribed punishment must be inflicted ; but in all others the court are to regulate their discretion by the nature of the crime. This will depend upon their frequency, enormity, the temptation to commit them, the necessity of an example, and a variety of other circumstances, that ought, in a peculiar manner, to be considered in estimating the offences of these persons. It certainly could not be the intent of the legislature that they should be punished according to the ordinary penal code, for then it were unnecessary to have gone further than a simple regulation of the trial, and not to have said any thing about the punishment ; and because, by the former act, the offence of stealing certain property is punishable with whipping and the pillory ; whereas stealing money would only be punished by burning in the hand. This is a discrimination in favor of an offence of equal magnitude, which I do not think the legislature intended to make. The act of 1786 (Iredell's Revisal, page 588.) does, in the preamble recognize the fact, that many persons by cruel treatment to their slaves, cause them to commit crimes for which they are executed. It then proceeds to take away the allowance which had been theretofore made to the owners of such slaves. The cruel treatment here alluded to must consist in withholding from them the necessaries of life ; and the crimes thus resulting, are such as are calculated to furnish them with food and raiment. It then appears, that in 1786, the legislature was perfectly aware, that from 1741 until that time, it had been the practice to execute slaves upon a conviction of grand larceny, when free persons were only burnt in the hand ; and they have not declared that this is a false exposition of the law. It seems to me that the acts subsequently made, had no other end than to extend to them the trial by jury, and to ascertain the respective provinces of the court and the jury, still leaving the discretion of the former, as to the punishment, as unlimited as the first act had made it. I am sensible that the law is a harsh one ; and I fear that abuses have been committed under it ; but these may be controlled by the legislature whenever

they think fit to interpose. Thinking as I do, from the short time I have had to deliberate on this case, that their intention is free from doubt, a sense of duty compels me to pronounce it, however repugnant it may be to my private notions of humanity.

Macay, J. The act of assembly passed in 1741, sec. 47., of chap. xxiv., makes the consulting, the advising, the conspiring to rebel, to make insurrection the plotting or conspiring of three or more slaves to murder any person or persons whatever, to be felony, and on conviction to suffer death. Section 48. of same chapter, directs the manner in which every slave committing such offence, or any other crime or misdemeanor, shall be tried, and what evidence shall be admissible, and direct the three justices and the four freeholders, on the slave or slaves being found guilty, "to pass such judgment on such offender according to their discretion, as the nature of the crime or offence shall require, and on such judgment to award execution." The offence found by the jury in this case, is an *attempt to poison*; therefore the offence does not come under the description of any of those offences enacted by the 47th section. Had the act stopped here, she must have been acquitted. But section 48 empowers the three justices and four freeholders to try her for any *other crime or misdemeanor*, and to pass such judgment, according to their discretion, as the nature of the offence may require.

Crimes and misdemeanors were offences known by the law at the time of passing this act, and the punishment also known and established. The offence found against Sue is an attempt to poison. If the same offence was committed by a free person, it could not be punished with death; it is only a misdemeanor of an aggravated nature, and could be punished with fine, imprisonment, and other corporal punishment; no judgment of death could be given. The punishment of this particular offence was known when the act passed. The act has made no alteration in the punishment; it was then discretionary with the court. It never was considered that the court could give judgment of death for this offence; they could fine, imprison, or inflict other corporal punishment, as had been established by common usage. The discretion given by the act of assembly, is a legal discretion, not the power of altering punishments, or affixing to any offence a punishment unknown to the law. This would be for the court to legislate, not to adjudicate, a power unknown to any of the courts of this state.

The justices of the county court have pronounced a judgment different from the nature of the offence which the jury have found against the prisoner; their discretion only extends to increasing or diminishing the punishment. Let the judgment pronounced by the said justices against the prisoner be reversed, and the prisoner be remanded to said justices, to receive such judgment as the laws and constitution of this state will warrant.

6.

BORE v. BUSH et al. 18 Martin's Louisiana Rep. 1.

Free persons of color are entitled to a trial by jury, and cannot be tried for offences by a justice of the peace.

Appeal from the court of the fourth district.

Per Cur. Porter, J. This is an action against a justice of the peace, and his constable, for false imprisonment. The petition states the arrest, and the previous proceedings. It avers they were illegal, oppressive, and done with an intention to extort money from the plaintiff. The justice pleaded, that he was acting in his official capacity. That he decided according to the best of his understanding; and that he was not responsible for errors of judgment. The constable denied that he had arrested or imprisoned the petitioner. The justice of the peace was not protected by his plea, of error in judgment, for he was not acting within his jurisdiction. Free persons of color are certainly bound to treat the citizens of the state with respect; and if they do not, they are subject to fine and imprisonment. But the law has provided, that for offences of this kind, they are entitled to a trial by jury. Now, as justices of the peace have no right to summon juries, it is a necessary consequence of the want of authority to do so, that the defendant was without power to try and condemn. The only cognizance he could take of the case was, to commit the plaintiff, unless he gave bail for his appearance at the next term of the district court. Mat. Dig. vol. 1. Judgment of the district court reversed.

7.

Ex parte. JESSEE BROWN. May T. 1831. 2 Bailey's Rep. 323.

A slave cannot be twice tried and punished for the same offence.*

A court of magistrates and freeholders had convicted and sentenced Brown to be whipped; which sentence was executed. He

* Much has been said of the disparity of punishment between the white inhabitants and the slaves, and negroes of the same state; that slaves are punished with much more severity, for the commission of similar crimes by white persons, than the latter. The charge is undoubtedly true to a considerable extent. It must be remembered that the

was afterwards tried and condemned to death for the same offence. A prohibition was granted, and on an appeal being taken to settle the question, the decision of the judge, on granting the prohibition, was sustained.

8.

STATE V. SIMS. Dec. T. 1830. 2 Bailey's Rep. 29.

The defendant being convicted of being accessory to a murder by a number of slaves, who had been tried, convicted, and executed, he moved for a new trial, on the ground "that the declaration of the said slaves, as to their agency in the murder, and the mode in which they perpetrated it, were received in evidence; and the declaration of each slave was received, not only as to his own guilt, but as to the acts of others."

The Court, *Johnson, J.*, overruled the motion for a new trial, and decided, that the confession of a slave of his own guilt, as principal, is admissible in evidence on the trial of a free white man as accessory before the fact.

The confession of a slave of his own guilt as principal, is evidence on the trial of a white man as accessory before the fact.

9.

STATE V. MARY HAYES. June T. 1829. 1 Bailey's Rep. 275.

The court held, that the 14th section of the act of 1740, which provides that all crimes and offences committed by free negroes, Indians, (Indians in amity with this state only excepted,) mulattoes, or mestizoes, shall be proceeded in, heard, tried, and adjudged, and determined, by a court of justices and freeholders, in like manner, as is directed for the trial of crimes and offences committed by slaves, any law, usage, or custom, to the contrary notwithstanding.

The statute relative to the tribunal for trial of negroes, &c. is exclusive.

primary object of the enactment of penal laws, is the protection and security of those who make them. The slave has no agency in making them. He is indeed one cause of the apprehended evils to the other class, which those laws are expected to remedy. That he should be held amenable for a violation of those rules established for the security of the other, is the natural result of the state in which he is placed. And the severity of those rules will always bear a relation to that danger, real or ideal, of the other class.

It has been so among all nations, and will ever continue to be so, while the disparity between bond and free remains. In a practical treatise it would probably be considered out of place to collect the various statutes in relation to whipping and other punishment of slaves, to be found in the statute books of the various states.

Per Cur. O'Neill, J. The jurisdiction conferred by the act, is exclusive in its character, by the terms of the grant. See *White v. Helmes*, 1 M'Cord's Rep. 430.; and *Groning v. Devanna*, 2 Bailey's Rep. 192.

10.

COMMONWEALTH V. WATTS. Dec. T. 1833. 4 Leigh's Rep. 472.

Construction of the statute of 1822 ch. 34.

The court in this case held, that a white girl under twelve years of age, and not having attained to puberty, is a white *woman*, within the meaning of the statute of 1822-3, ch. 34. § 3., making it felony, punishable with death, for a slave, free negro, or mulatto, to attempt to ravish a white woman; and the court observed, that they did not think there was any distinction between a violence of this kind practiced upon a female between the age of ten and twelve, and a similar violence practiced upon one above the age of twelve. Both are equally rapes.

11.

COMMONWEALTH V. FIELDS. Dec. T. 1832. 4 Leigh's Rep. 648.

The same statute.

Fields, a free negro, was indicted under the statute of 1822, ch. 34. § 3. for assaulting and attempting to ravish a white woman.

The jury found a special verdict in the following words: "We find from the evidence, that the prisoner did not intend to have carnal knowledge of the within named S. L., as alleged in the indictment, by *force*; but that he intended to have carnal knowledge of her while she was asleep; that he made the attempt to have such carnal knowledge of her when she was asleep, but used no force except such as was incident to getting to bed with her, and stripping up her night garment, in which she was sleeping, and which caused her to awake."

Per Cur. This court is of opinion, that upon the special verdict found in this cause, judgment of acquittal ought to be rendered in favor of the prisoner.

(XVI.) OF THE LIABILITIES OF THE MASTER FOR THE ACTS OF HIS SLAVE.

(A.) FOR CONTRACTS MADE BY THE SLAVE.

1.

DUNBAR v. WILLIAMS. May T. 1813. 10 John's. Rep. 249.

Assumpsit for attendance upon the defendant's negro slave. The slave had been cured of a disease by the plaintiff without the knowledge of the defendant. Verdict for the plaintiff.

No action lies by a physician against the master for attendance upon his slave without his knowledge unless it be a case of extreme necessity.

Per Cur. The action cannot be sustained. It would be dangerous to the rights of owners of slaves, to allow them to charge their masters with medical assistance. But if medical or other assistance be rendered to a slave in a case of necessity, which does not admit of a previous application to the master, the person so rendering the assistance, would probably be entitled to compensation from the master; the law would raise an implied assumpsit, on the ground that the master was legally bound to make the requisite provision for the slave.* Judgment reversed.

2.

JOHNSON et Ux v. BARRET. Dec. T. 1834. 2 Bailey's Rep. 562. S. P. WELLS v. KENNERLY, 4 N. M'C. Rep. 123.; DUNBAR v. WILLIAMS, 10 Johns. Rep. 249.

This was an action brought by the plaintiff for services rendered to the slave of the defendant in the character of midwife. The de-

Liability of the master for medical services furnished the slave in his absence.

* And see Hall v. Mullin, 5 Har. and Johns. Rep. 190., where the court held, that no contract of any validity whatever could be made with a slave without the consent of the owner. But the slave may be an agent for his master, and as such, the master may be bound by the acts of his slave. Whether the law of principal and agent, as adopted by the common law, can be applied to master and slave, may be doubted; at least to its full extent. But there can be no doubt but that in the ordinary domestic business of the master in which it is usual to employ slaves, the master may do his business through the agency of his slave, and is bound by the acts of the slave in the usual course of that business with others. Perhaps the true distinction is, that in the ordinary business of the master, the slave may be an agent, and the law will imply a contract on the part of the master, but where skill and improved intellect are requisite for the performance of the undertaking or business, there would arise no implication; but an express command or ratification would be necessary to hold the master liable.

defendant had instructed the pregnant slave to obtain the services of a colored midwife, whose services could be obtained for \$4 00.; but the slave obtained the services of the plaintiff's wife, who charged \$10, which was the usual charge. Judgment for plaintiff. Defendant appealed to the circuit court, where the judgment was reversed. An appeal was taken to this court to reverse the judgment of the circuit court.

Per Cur. Johnson, J. The general rule is, that the master is not liable for the contract of his slave, made without his consent or authority. But there are many exceptions to the general rule, and this case appears to be one of them. If a slave is in peril in the absence of his master, the interest of the owner is most effectually subserved by rendering assistance to the slave; and in good conscience, the owner is bound to make satisfaction. In addition to this, the case in hand is peculiar. The situation of the defendant's slave was that which is generally one of extreme peril, requiring instant aid. And if that was the situation of the defendant's slave at the time Mrs. Johnson, the plaintiff, was called in; and I understand it was from the justices' certificate, she was within the exception, and was entitled to recover. I am, therefore, of opinion, that the order of the circuit court concerning the justices should be reversed, and that of the county court affirmed.

3.

WELLS v. KENNERLY. Jan. T. 1827. 4 M'Cord's Rep. 123.

The owner is not liable for medical attendance upon a hired slave given at the request of the hirer.

The defendant hired his slave; and while in the service of the person hiring, the slave was visited by the plaintiff, a physician, who brought this action against the owner for medical attendance. The court decided the owner was not liable; the hirer having sent for the physician. He alone was liable. Motion for a new trial.

Per Cur. Colcock, J. In this case the motion must be refused, whether it be determined by the rules of law, or the policy of the country. There is no privity of contract between the plaintiff and defendant; and a voluntary service rendered a slave, when his master is at hand, cannot create a responsibility, except under some peculiar circumstance of sudden emergency. The service was rendered to the defendant, and was for his immediate benefit. In the case before us, from the very nature of the obligation imposed on the person hiring, the absolute control over the slave is given

up by the master. The obligation to supply his daily or hourly wants must necessarily be assumed by the person who takes this absolute possession of a slave. Motion dismissed.

4.

GORE v. BUZZARD'S ADM'RS. Feb. T. 1833. 4 Leigh's Rep. 231.

Assumpsit by Buzzard's administrators against Gore. The facts in this case were as follows: For some four or five years preceding the death of Buzzard, who was a tanner, Gore was in the habit of sending raw hides to Buzzard's tannery, and getting tanned leather for them. But he never transacted any part of these dealings in person; his raw hides having been always brought to the tannery, and the tanned leather always sent to him by his slaves, without any written order from him, and, indeed, without a word passing between him and Buzzard on the subject. That since Buzzard's death, Gore had dealt with two other tanners in the neighborhood, in the same manner, through the agency of his slaves; he always sending his raw hides, and the tanners sending back tanned leather by the slaves, without written orders from Gore, or a word said by him to the tanners; and the accounts of these tanners for the debts so contracted by Gore, through the agency of his slaves, had been settled by him without dispute; that the items of Buzzard's account, namely, the charges for tanned leather sent Gore by his slaves, and the credits for raw hides brought by them, were first set down on a slate, and thence posted in a book by Buzzard himself; but Gore's dealings with Buzzard, as charged in those accounts, amounted to about the same *per annum*, as his dealings with the other two tanners afterwards; that, in fact it was the habit of Gore to send his raw hides to some tannery, and to receive tanned leather in exchange, by his slaves, only giving verbal directions to them, to deliver the raw hides, and bring back what tanned leather he wanted; that after Buzzard's death, Gore desired a witness to apply to his administrators for his account; which being sent him, he examined it, and said he would not pay interest which the administrators had charged, but that if they would give him the credits he was entitled to, he would pay the principal, if any should be due; and that Gore procured the assignment of a bond of one of Buzzard's administrators, saying, he expected the amount of that bond would be enough to meet the claim of Buzzard's estate against him. Judgment was rendered

A person sends raw hides to a tanner, and receives tanned leather in return, by his slaves; held, he is responsible to the tanner for the difference for the value of the raw material and the manufactured article, notwithstanding the dealings were conducted on his part through the agency of his slaves, it appearing that the slaves acted by verbal directions of their master.

in favor of Buzzard's administrators, and Gore appealed to this court.

Per Cur. Carr, J. The facts proved furnish the strongest grounds to infer, that for a series of years, Gore was in the habit of getting his leather from Buzzard's tannery; that though his slaves were his agents, or rather his instruments for carrying raw hides to the tanner, and bringing back tanned leather, yet it was he who sent the raw material and received the manufactured article; and that he was to pay the difference, if any, between values of what he thus bought and sold.

When Buzzard's administrators rendered the account, at Gore's instance, he examined it, and did not object to any of the charges against him; he only objected to the charge of interest, and said that if they would give him the credits he was entitled to, he would pay the principal. This was a plain admission of the justice of the account, except as to the interest, and as to the credits he claimed, which, however, he never attempted to prove; and this admission alone affords a decisive answer to the whole argument for the appellant. Judgment affirmed.

5.

CHASTAIN v. BOWMAN et al. May T. 1833. 1 Hill's Rep. 270.

A master
may con-
stitute his
slave his a-
gent.

Case against the defendants as common carriers. It appeared they owned a freight boat and put their patroon on board to receive freight for transportation of goods as they passed down the river. The patroon received the plaintiff's cotton, which was burnt before it reached Augusta.

The court below charged the jury, that a slave might be the agent of his master, and if his agency was established, the master was bound. Verdict for plaintiff, and motion for a new trial.

Per Cur. Johnson, J. Is it not questioned, that a master may constitute his slave his agent, and I cannot conceive of any distinction between the circumstances which constitute a slave and a free-man an agent. They are both the creatures of the principal, and act upon his authority. There is no condition, however degraded, which deprives one of the right to act as a private agent. Motion dismissed.

6.

UNIVERSITY, &c. AND OTHERS v. CAMBRELING, March, T. 1834.
 Yerger's Tenn. Rep. 79.

This is a writ of error, prosecuted from a decree rendered in the chancery court at Columbia, on the 6th March, 1832. The bill states, that complainant is the only heir at law of Col. Patton, a colonel in the North Carolina line during the revolutionary war. That Col. Patton suffered and caused to enlist as a musician, in the service of the United States, his negro named Frederick, who served during the war by consent of his master, and was thus entitled to a one thousand acre warrant for his services. That on the 8th August, 1821, a warrant, No. 766, for one thousand acres, issued to the University of North Carolina, for the services of said slave, reciting that he died without heirs, which was assigned by the University to Andrews, and by Andrews to John Terrill. It was entered and surveyed in Dec. 1822, in the name of John Terrill, and an amended bill was filed stating that fact. A copy of the warrant filed with the bill, shows the interest in the warrant was vested in John Terrill. The land was not granted in September, 1823, when the bill was filed. The bill was dismissed by the complainant against Andrews, as he had transferred his interest, and no decree could be had against him. The University appeared by their counsel, and a subpoena and a copy of the bill were served on Terrill in Weakley county, and against both parties the bill was set for hearing *ex parte*.

The owner of a slave is entitled to the warrant issued to the slave for military services rendered by him.

At September term, 1829, it was ordered, by consent of the parties, that this cause await the final decision of the supreme court of errors and appeals in the cause of Ivey v. Pinson; and in March 1832, that suit having been decided, the chancellor pronounced a decree in favor of complainant. One of the errors assigned was, that the warrant issued to the slave, the property of the complainant's father, was unauthorized and void; and vested no right in the complainant.

Per Cur. Catron, Ch. J. It is contended, that the act of 1782, ch. 3, sec. 6., never could have intended to provide a permanent reward in land, a home and fireside for a slave incapable of holding property, without a will of his own, and who, from his political and moral condition, it was impossible to reward. This argument has great force in it; but it is addressed to us in vain. The board of commissioners of North Carolina has construed the act of 1782, and adjudged that negro Frederick, for his services as a musician

in the continental line, was entitled to one thousand acres of land. By the act of 1804, ch. 14., North Carolina reserved the exclusive right of issuing military warrants, although Tennessee was entrusted with power to cause them to be located. As between the soldier and North Carolina, acting as a sovereign power through her commissioners, the adjudication that Frederick was entitled is conclusive. *Pinson and Hawkins v. Ivey*, 1 Yerger's, Rep. 303. 328. 346. 350. So far, all the judges concurred in *Ivey and Pinson*; and which conclusion is supported by the decision of the supreme court of the United States, in *Comegys v. Vasse*, 1 Peters' Rep. 201. Was Col. Patton entitled to the warrant issued for the services of his slave? In *Pinson and Ivey* it was adjudged, that North Carolina held the military lands in trust for the true owners. To bestow them on others was an act in violation of the trust, subject to be set aside by the ordinary tribunals of justice, notwithstanding the sentence of the board of commissioners of that state.

Frederick, the slave of Col. Patton, earned this warrant as a musician in the continental line. What is earned by the slave belongs to the master, by the common law, the civil law, and the recognized rules of property, in the slave holding states of this union. Co. Litt. 117., and Hargrave's note; Cooper's Justinian, 411.; Tucker's Black. part 2., appendix 55. North Carolina held as trustee for Col. Patton, and after his death, for his heir, Mrs. Cambreling. John Terrill, having purchased an equitable title, is subject to the same equities of his vendor as was adjudged in *Ivey and Pinson*, and is the settled law of the courts of chancery. *Craig v. Leiper*, 2 Yerger's Rep. 193. *Owen's heirs v. Stubblefield and others*, Sparta, 1833. The decree will be affirmed, with costs.

(B.) FOR HIS NEGLIGENCE, WHEREBY OTHERS ARE INJURED.

WINGIS v. SMITH. Nov. T. 1825. 3 M'Cord's Rep. 400.

A master is not liable for damages from the negligence of his slave.

Summary process against the defendant for the negligence of his servant. It appeared the slave drove his master's coach and left it standing at the door in the street, when the horses became frightened, ran away, and broke the plaintiff's bread cart.

The court below supposed the accident to be owing to the gross negligence of the servant in not continuing on the box of the coach and watching his horses, and that the master was liable therefor. The defendant appealed to this court.

Per Cur. Nott, J. After referring to the civil law, where a person was allowed what was called *actio noxalis*, by which a master was made liable for any damage done to another by his slave, such as theft, robbery, or any other damage, Cooper's Justinian, 354., and to Puffendorff, book 3., Grotius, lib. 2. ch. 17. 375. This point has been settled by our own courts in the case of *Snee v. Trice*, 2 Bay's Rep. 345. In that case, the defendant's negroes had suffered a fire to break out from the field where they were at work, and to burn up the plaintiff's crib of corn. The court held, that the defendant was not liable for the negligence of his servants. And the question was decided upon general principles, and not upon the particular circumstances of the case. Whether the result of the negligence be the burning of the crib of corn, or the breaking of a cart, the principle would be the same. The rule, however, does not extend to slaves who are tradesmen, carriers, &c., for there the master's security for their faithful performance of their duty depends upon his holding them out as capable of performing the work or business undertaken.

(C.) FOR TORTS AND CRIMES COMMITTED BY THE SLAVE.

1.

GURRIERE v. LAMBETH. April T. 1836. 9 Louisiana Rep. 339.

The plaintiff brought an action of damages against the defendant, and alleged, that he rented a store of the defendant, and while he was absent, the defendant ordered one of his slaves to nail up a back window of the store to vex and harass him, the said plaintiff; and the slave, in nailing up the window, spilt a large quantity of ink on the goods of the plaintiff, and damaged them. Verdict for plaintiff, and defendant appealed.

Per Cur. Bullard J. A bill of exceptions was taken to the refusal of the judge to instruct the jury, at the request of defendant's counsel, that the plaintiff could not recover, unless it was proved that the act from which the injury resulted, was done by the order

The master is liable for acts and injuries done by his slave, acting either by or without his authority, and is liable for all damages occasioned by his offence, or quasi offence. *

* The court held, in *Snee v. Trice*, 2 Bay's Rep. 345., that a master is responsible for the acts of his servants and slaves, in all cases in the way of trade, or public employment, or where any injury is occasioned to another by any act done by a servant, in pursuance of his master's directions, but not for unauthorized proceedings; and it seems that the English law, which holds masters responsible for the negligence of their servants, is not applicable to slavery.

and authority of the defendant, or with his knowledge and approbation; and that even his subsequent knowledge and approbation of such act would not make him responsible. But the court charged, that the master was responsible if the damage had been caused by the slave, acting either by or without the master's order. We are of opinion, the court did not err. The civil code declares, that "the master shall be answerable for all the damages occasioned by an offence, or *quasi* offence committed by his slave, independent of the punishment inflicted on the slave." Art. 180.

2.

STATE v. FRANCIS ANONE. May T. 1819. 2 Nott & M'Cord's Rep. 27.; S. P. SNEE v. TRICK, 2 Bay's Rep. 345.; STATE v. DAWSON, 2 Bay's Rep. 360.

The extent of masters liability.

Per Cur. *Richardson, J.* The law is well settled, both in this state and abroad, that a master is not liable for the acts of his servants unless done by his authority; and that the principal is not liable for the criminal acts of his mere civil agents we fully recognize. And he cited *Middletown v. Fowler*, 1 Salk. Rep. 282.; *M'Manus v. Cricket*, 1 East's Rep. 106.

3.

KETTLETAS v. FLEET. Feb. T. 1811. 7 John's. Rep. 324.

A written agreement by a master with his slave to manumit him is obligatory—it rests in benevolence, and not in contract.

This was an action to recover the price of a negro boy sold by the plaintiff to the defendant. The defendant gave notice, with the general issue, that he would give in evidence, that the plaintiff had promised the boy in writing, that he would manumit him in eight years from a certain period, upon condition of his faithful service during that period; and that the plaintiff had no right to transfer the boy for a longer period. The jury, under a charge from the court, found for the defendant.

On a motion for a new trial it was contended, that the writing was not obligatory.

Per Cur. The covenant of the plaintiff to manumit the negro in eight years, on condition of faithful service, was one that the slave could avail himself of if the condition was fulfilled. What was said by the court in the case of negro Tom, 5 Johns. Rep. 365., is to that effect. The manumission of a slave does not rest upon the principles of a contract, depending upon a consideration; but it is an act of benevolence, sanctioned by the statute, and made obligatory, if in writing.

4.

STEVENSON V. SINGLETON. Feb. T. 1829. 1 Leigh's Rep. 72.

Gibbon made a contract with his slave Singleton, that he would emancipate him on the slave's paying him one thousand dollars, and the slave paid him \$566. But no deed of emancipation was executed by Gibbon.

Chancery cannot enforce a contract between master and slave, tho' the slave perform his part.

Per Cur. Cabell, J. In the case of *Sawney v. Carter*, 6 Rand's Rep. 173., the court refused, on great consideration, to enforce a promise by a master to emancipate his slave, where the conditions of the promise had been partly complied with by the slave. It is impossible to distinguish that case from this. The court proceeded on the principle, that it is not competent to a court of chancery to enforce a contract between master and slave, even although the contract should be fully complied with on the part of the slave.

5.

EMERSON V. HOWLAND et al. May T. 1816. 1 Mason's Rep. 45.

The plaintiff shipped his slave on board the *Ann Alexander*, for Norfolk to Liverpool, and from thence to ports in Europe. The ship was captured on her passage from Liverpool to Archangel in Russia, and carried into Norway, and the slave discharged by his own consent. The ship was restored, and arrived in Boston, when this suit was commenced by the master for his wages.

Where a mariner slave is discharged from on board a ship illegally, the master may recover wages up to the time when he might have returned to the United States.

Per Cur. Story, J. Capture does not dissolve the contract for wages. The slave could not consent to be discharged. The contract was entered into, by the owner in Virginia, and must be construed with reference to the *lex loci contractus*. In Virginia, slavery is expressly recognized, and the rights founded upon it, are incorporated into the whole system of the laws of that state. The owner of the slave has the most complete and perfect property in him. The slave may be sold, or devised, or pass by descent, in the same manner as other inheritable estate. He has no civil rights or privileges. He is incapable of making or discharging a contract, and the perpetual right to his services belongs exclusively to his owner. The slave was illegally discharged, and the master is entitled to recover his full wages up to the time when he might have returned to the United States.

6.

THE STATE v. JONES. Dec. T. 1828. 2 Devereaux's North Carolina Rep. 48.

An owner who has notice of a capital charge against his slave, in case of a conviction is not only bound to pay the prison fees, but also the fee allowed by the act of 1797, (Rev. ch. 484.) for carrying the sentence into execution.

Negro *Charles*, the property of the defendant, had been convicted of a rape, and executed.

A question was made before his honor Judge Norwood, whether the defendant, as the owner of the slave, was liable to his prison charges, and to the fee of ten dollars allowed for carrying the sentence of death into execution. Both questions were decided for the state, and the defendant appealed.

Per Cur. Hall, J. From the two acts of assembly recited in the case of the State v. Isaac, decided at this term, 2 Dev. Rep. 47., the defendant, *Jones*, the owner of the slave, is liable for the costs of prosecution against him, because if the slave had been a freeman, his estate would be liable. With respect to the fee of £5 for executing *Charles*, it is included, I think, in the costs of prosecution. In the act of 1797, (Rev. ch. 484,) amongst other fees to which the sheriff is entitled, for apprehending and carrying criminals to jail, ten shillings is allowed for carrying any sentence or decree of the court into execution, where the convict is to be corporally punished, and £5 for the execution and decent burial of any one. By the same act, provision is made for the payment of such fees by the state, provided they cannot be got out of the estate, or body of the prisoner.

But it declares, that no such claim shall be allowed, until a *feri facias* shall have issued to the county in which the prisoner may be supposed to have owned property, and the sheriff's return thereon, that nothing was to be found, nor until a *capias ad satisfaciendum*, shall have issued, and if it was executed upon the body of the criminal, not until he discharged himself by taking the oath of insolvency. From this act it appears that the estate of the slave would be liable in case he was a freeman. It follows, of course, that his owner is so. Judgment affirmed.

7.

MOFFIT v. VION. March T. 1833. 5 Louisiana Rep. 346.

The owner may be prosecuted civilly for damages for theft, &c. of his slave before a criminal prosecution is instituted.

The plaintiff sued the defendant to recover the value of goods stolen from his store by the defendant's slave. The defendant excepted on the ground, that no previous criminal prosecution of the slave had taken place. The judge sustained the exception and dismissed the petition. Plaintiff appealed.

Per Cur. Mathews, J. In pursuance of the articles of the code, we are of opinion, that a person who suffers damages by the theft, or robbery of a slave, may proceed immediately and directly against the owner of such slave, and obtain judgment in the civil suit, to ascertain the amount of damages without a previous criminal prosecution; and that, on a judgment thus rendered, an execution regularly issue, unless the owner of the slave should choose to abandon within three days after the rendition of the judgment.

8.

THE STATE v. ISAAC. Dec. T. 1828. 2 Devereaux's North Carolina Rep. 47.

An indictment for murder had been found against the prisoner, a slave. On the last circuit, a *nolle prosequi* was entered; and upon the motion of the owner, who had been duly notified of the charge, the prisoner was discharged. But his honor, Judge Martin, ordered the jail fees and other costs to be paid by the owner, from which the latter appealed to this court.

Per Cur. Hall, J. By the act of 1793, (Rev. ch. 381, sec. 2,) it is declared, that where a slave is charged criminally, his owner, provided he has notice of it, is bound to pay all costs attending the trial, provided also, that the slave, if a freeman, would be liable to pay them.

By the act of 1795, (Rev. ch. 433. sec. 7,) it is declared, that every person who shall be committed to a public jail, by lawful authority, for any criminal offence, or misdemeanor against the state, shall bear all reasonable charges for carrying and guarding them to the said jail, and also for their support therein, until lawfully released. And all the estate which the person possessed at the time of committing the offence, shall be subject to the payment of the aforesaid charges and other prison fees, in preference to all other demands.

From these acts of the Legislature, it appears that Isaac, if a free man, would be liable for his prison fees, and, consequently, his owner is bound for them. Judgment affirmed.

9.

CALDWELL v. SACRA. Spring T. 1811. 6 Littell's Rep. 118.

Per Cur. Logan, J. In an action of trespass against Caldwell, upon the allegation that he had, or caused to be, tied to the tail of a certain horse of the plaintiff, large sticks of wood, and had so beat and caused the said horse to run as thereby to occasion his

Where a slave has been confined in jail upon an indictment for murder, and a *nolle prosequi* is entered, the owner having had due notice of the charge is liable under the acts of 1793 and 1795, (Rev. ch. 381. sec. 2., and ch. 433. sec. 7.) for the jail fees, as well as the court costs.

A man is liable for a trespass committed by his slave.

death. Upon the plea of not guilty, the plaintiff proved the death of the horse, occasioned by the sticks which had been tied to his tail, and the confession of Caldwell, that his negro boy had tied sticks to the horse's tail, the horse having frequently broken into his wheat field. Upon being then informed by the witness that he had understood the horse had died from the abuse occasioned by the sticks which had been tied to his tail, Caldwell replied that he was glad of it. Verdict for the plaintiff, and motion for a new trial. There is no point of difficulty in the cause. For whether the conduct of the slave was under the direction or sanction of the master, is not material; or whether the master's direction or sanction thereof is tested by his express command, or by his presence, and not forbidding the act; or by other circumstances evincing his approbation, is equally immaterial. He is in either case liable. For the law is, if one agree to a trespass which has been committed by another for his benefit, this action lies against him, although it was not done in obedience to his command, or at his request. *Bac. Abr.* 185. sect. 4. title Trepass. *A fortiori*, ought the master of a slave to be liable in such case for the trespass of the slave.

10.

CAWTHORN V. DEAS. June T. 1835. 2 Porter's Rep. 276

The master of a slave is not liable for injuries caused by the negligent conduct of the slave when not acting in his employment, and under his authority.

The plaintiff sued the defendant in trespass, for an injury to his property caused by the negligent conduct of the defendant's slaves.

The court charged the jury, that it was not essential for the plaintiff to prove that the slaves acted under their master's authority; but that in presumption of law, slaves were always under their master's control, and that he was liable for their negligent conduct. Verdict for plaintiff.

Per Cur. Thornton, J. The judgment must be reversed. By the common law the master is only liable for torts done in the execution of his authority, or for damage flowing from negligent conduct in his employment. But, according to the civil law, though the master be liable for any injury or damage done by the slave, yet that liability is limited to the value of the slave, it being always in the option of the master to pay the estimate of the damage done, or surrender the body of the slave as a recompense. We adopt the common law as applied to master and servant.

11.

SAWNEY v. CARTER. March T. 1828. 6 Rand's Rep. 173.;

S. P. STEVENSON v. SINGLETON, 1 Leigh's Rep. 72.

Per Cur. Coalter, J. The pauper, in this case, claims his freedom on an alleged contract between his master and him, at the time he was purchased at an executor's sale, that on paying his purchase money, he should be free. He alleges, that he has paid accordingly; but that his master would not emancipate him. The proof of the contract is by no means clear; although, if that was proved, and such a contract could be enforced in equity, there is proof enough in the record, of his master having received some property, to wit, a wagon and three horses, which the pauper claimed as his own, and the proceeds of his earning by wagoning, to send the case to an account. There is no case in this court, that I can find, justifying the idea that a court of equity can enforce such a contract; but, the reverse has been decided, as will be seen hereafter. There is no doubt that a court of equity may entertain a bill, where the party has been detained in *slavery*, and has a *legal* title to his freedom; but there is some impediment to the assertion of that right at law, which would, in any other case, justify the interposition of a court of equity. As, if the will, by which he was emancipated, was fraudulently suppressed or destroyed; or a deed, prior to that of emancipation, and which had been abandoned, was fraudulently set up as a bar to the recovery at law; as was lately decided in the case of *Talbert v. Jenny*, 6 Rand's Rep. 59. In the case of *Dempsey v. Lawrence*, Gilm's Rep. 333., the pauper was not *so* before the court, as that the merits could be decided, either by the court below, or by this court. The bill was dismissed; and this court only sent the case back, to be placed in a situation in which it could be tried on the merits. How this court would have decided, could the merits have been gone into, cannot, therefore, be known; and, consequently, that case can give no rule in this. The case of *John Rose*, a pauper, *v. Harwell*, adm'r of Duncan Rose, jun., was decided in this court against the pauper. That was a very strong case for the pauper, as I find by my note of it, though I was not present when it was decided. According to these notes, it appears, that this man belonged to the estate of the late Col. Banister, near Petersburg; that he was the son of Duncan Rose, the elder, who, on

A court of equity can not enforce a contract between master and slave, whereby the master agrees that he will emancipate his slave after a certain condition is performed, which condition has been complied with by the slave.

his death bed, recommended him to the care of his nephew, the intestate of the appellee. On the sale of Banister's estate, he was purchased by Dr. Wilson for 90*l.*, who sold him to the intestate for the same sum. The intestate then put him apprentice to a carpenter. After his apprenticeship, he worked as a journeyman, and down to the death of the intestate, worked for himself, and was treated as a freeman by his employer, who paid him his earnings. The intestate frequently admitted that he was free, and said that he had paid him his purchase money, and more; and never interfered with him as a slave. His administrator always considered him as free; but finding that he had not been emancipated by deed, and not knowing but that he would be taken to pay debts, considered it his duty to take him as a slave. He says he is not hostile to his claim to freedom; but suggests, for the consideration of the court, whether a contract for freedom can be set up in a court of equity, and whether *any other mode of emancipation* than that prescribed by law, can be sustained. By the act of May, 1723, 4 stat., at Large, 132., it is enacted, that no negro, mulatto, or Indian slave, shall be set free on any pretence whatever, except for some meritorious service, to be adjudged and allowed by the governor and council, and license therefor first had and obtained; that if they shall be otherwise set free, it shall be lawful for the churchwardens, and they are required, to take them up and sell them as slaves, &c. This is re-enacted by the act of October, 1748, 6 stat., at Large, 112. By the act of May, 1782, 11 stat., at Large., 39, reciting, that application had been made to *empower* persons disposed to emancipate their slaves to do so, it is enacted that it shall *hereafter* be lawful for any person, by his last will and testament, or by any other instrument in writing, under his or her hand and seal, attested and *proved in the county court* by two witnesses, &c., to emancipate his slaves, or any of them, &c. This act is brought into the revision of 1794, ch. 103., sec. 36., by the 26th section of which, 1 Rev. Code, 433, it is made unlawful to permit slaves to go at large, and hire themselves out, under penalty of being apprehended and sold; and is also brought into that of 1819. sec. 53., p. 433.

It has also been decided by this court, that a deed of emancipation, not recorded in the proper court, but in some other, gives no title to freedom, until properly recorded. *Givens v. Mann*, 6 Munf. Rep. 191.; *Lewis v. Fullerton*, 1 Rand's Rep. 15.

(XVII.) OF THE LIABILITY OF OTHERS TO THE MASTER FOR ABUSING HIS SLAVE.

(A.) BY ASSAULTING, BEATING, OR HARBORING HIM.

1.

CORNFUTE v. DALE. April T. 1800. 1 Har. & John's. Rep. 4.

This was an action of trespass for an assault and battery committed by the defendant on the plaintiff's slave.

It was contended, that the action could be sustained, and that it was not necessary to prove a loss of service; that an action might be supported for beating the plaintiff's horse, 2 Lutw. 1481; 20 Viner's Abr. 454; and that the lord might have an action for the battery of his villein which is founded on this principle, that as the villein could not support the action, the injury would be without redress unless the lord could. On the other side, it was said, that *Ld. Ch. J. Raymond* had decided, that an assault on a horse was no cause of action, unless accompanied with a special damage.

Trespass will not lie by a master for an assault and battery on his slave, unless it be attended with a loss of service.

Ch. J. Chase assigned, among other reasons, for the decision in favor of the defendant, that the action did not lie, because there was not a reciprocity of action; no action being maintainable against a master for an assault and battery committed by his slave; and that the injury to the slave was not dispunishable, it being indictable as an offence; and that without an injury or wrong to the master, no action could be sustained. And see *Belmore v. Caldwell*, 2 Bibb's Rep. 76, where the court say, that actual possession of the slave by the master is necessary to entitle him to an action of trespass for beating him.

2.

SMITH v. HANCOCK. 4 Bibb's Rep. 222.

Held by the court, that in an action of trespass for beating a slave, the property of the plaintiff, whereby he died, the defendant may justify by showing that the slave was at an unlawful assembly combining to rebel, and that he refused to surrender, and resisted by force.

Justification of.

3.

STATE v. HALE. Dec. T. 1823. 2 Hawk's North Carolina Rep. 582.

This was an indictment charging the defendant with having

A battery committed on a slave,

no justification, or circumstances attending it, being shown, is an indictable offence.

committed an assault on a slave, and with inhumanly beating wounding, &c. The jury found, that the defendant committed personal violence on the slave, mentioned in the indictment, by striking him ; and whether this amounted to the offence charged, they referred it to the court to decide. The judge below rendered judgment for the defendant, and the state appealed.

Taylor, Ch. J. The indictment, in this case, is for an inhuman assault and battery, but the special verdict states, that the defendant struck the slave. The question, therefore, presented to the court, is, whether a battery, committed on a slave, no justification, or circumstances attending it being shown, is an indictable offence. As there is no positive law, decisive of the question, a solution of it must be deduced from general principles, from reasonings founded on the common law, and adapted to the existing condition and circumstances of our society, and indicating that result which is best adapted to general expedience. Presumptive evidence of what this is, arises, in some degree, from usage, of which the legislature must have been long since apprised, by the repeated conviction and punishment of persons charged with this offence. It would be a subject of regret to every thinking person, if courts of justice were restrained, by any austere rule of judicature, from keeping pace with the march of benignant policy and provident humanity, which for many years has characterised every legislative act relative to the protection of slaves, and which christianity, by the mild diffusion of its light and influence, has contributed to promote ; and even domestic safety and interest equally enjoin.

The wisdom of this course of legislation has not exhausted itself on the specific objects to which it was directed, but has produced wider and happier consequences, in securing to this class of persons, milder treatment and more attention to their safety. For the very circumstance of their being brought within the pale of legal protection has had a corresponding influence upon the tone of public feeling towards them ; has rendered them of more value to their masters, and suppressed many outrages, which were before but too frequent. It is, however, objected in this case, that no offence has been committed, and the indictment is not sustainable, because the person assaulted is a slave, who is not protected by the general criminal law of the state ; but that, as the property of an individual, the owner may be redressed by a civil action. But though neither the common law, nor any other code yet devised by man, could

foresee and specify every case that might arise, and thus supercede the use of reason in the ordinary affairs of life, yet it furnishes the principles of justice adapted to every state and condition of society. It contains general rules, fitted to meet the diversified relations, and various conditions of social man. Many of the most important of these rules are not set down in any statute or ordinance, but depend upon common law for their support ; of this description is the rule, that breaking the public peace is an offence, and punishable by fine and imprisonment. An assault and battery is not indictable in any case to redress the private injury ; for that is to be effected by a civil action ; but, because the offence is injurious to the citizens at large by its breach of the peace, by the terror and alarm it excites, by the disturbance of that social order which is the primary object of the law to maintain, and by the contagious example of crimes.

The instinct of a slave may be, and generally is, tamed into subservience to his master's will, and from him he receives chastisement, whether it be merited or not, with perfect submission ; for he knows the extent of the dominion assumed over him, and that the law ratifies the claim. But when the same authority is wantonly usurped by a stranger, nature is disposed to assert her rights, and to prompt the slave to a resistance, often momentarily successful, sometimes fatally so. The public peace is thus broken, as much as if a free man had been beaten, for the party of the aggressor is always the strongest, and such contests usually terminate by overpowering the slave, and inflicting on him a severe chastisement, without regard to the original cause of the conflict. There is, consequently, as much reason for making such offences indictable, as if a white man had been the victim. A wanton injury committed on a slave is a great provocation to the owner, awakens his resentment, and has a direct tendency to a breach of the peace, by inciting him to seek immediate vengeance. If resented in the heat of blood, it would probably extenuate a homicide to manslaughter, upon the same principle with the case stated by Lord Hale, that if A. riding on the road, B. had whipped his horse out of the track, and then A. had alighted and killed B. These offences are usually committed by men of dissolute habits, hanging loose upon society, who, being repelled from association with well disposed citizens, take refuge in the company of colored persons and slaves, whom they deprave by their example, embolden by their familiarity, and then beat, under the expectation that a slave dare not

resent a blow from a white man. If such offences may be committed with impunity, the public peace will not only be rendered extremely insecure, but the value of slave property must be much impaired, for the offenders can seldom make any reparation in damages. Nor is it necessary, in any case, that a person who has received an injury, real or imaginary, from a slave, should carve out his own justice; for the law has made ample and summary provision for the punishment of all trivial offences committed by slaves, by carrying them before a justice, who is authorized to pass sentence for their being publicly whipped. 1 Rev. Code, 448. This provision, while it excludes the necessity of private vengeance, would seem to forbid its legality, since it effectually protects all persons from the insolence of slaves, even where their masters are unwilling to correct them upon complaint being made. The common law has often been called into efficient operation, for the punishment of public cruelty inflicted upon animals, for needless and wanton barbarity exercised even by masters upon their slaves, and for various violations of decency, morals, and comfort. Reason and analogy seem to require that a human being, although the subject of property, should be so far protected as the public might be injured through him.

For all purposes necessary to enforce the obedience of the slave, and to render him useful as property, the law secures to the master a complete authority over him, and it will not lightly interfere with the relation thus established. It is a more effectual guarantee of his right of property, when the slave is protected from wanton abuse from those who have no power over him; for it cannot be disputed, that a slave is rendered less capable of performing his master's service, when he finds himself exposed by the law to the capricious violence of every turbulent man in the community.

Mitigated as slavery is by the humanity of our laws, the refinement of manners, and by public opinion, which revolts at every instance of cruelty towards them, it would be an anomaly in the system of police which affects them, if the offence stated in the verdict were not indictable. At the same time it is undeniable, that such offence must be considered with a view to the actual condition of society, and the difference between a white man and a slave, securing the first from injury and insult, and the other from needless violence and outrage. From this difference it arises, that many circumstances which would not constitute a legal provocation for a battery committed by one white man on an other,

would justify it, if committed on a slave, provided the battery were not excessive. It is impossible to draw the line with precision, or lay down the rule in the abstract ; but as was said in Tacket's case, the circumstances must be judged of by the court and jury, with a due regard to the habits and feelings of society. But where no justification is shown, as in this case, I am of opinion the indictment is maintainable.

Hall, J. I concur in the opinion given. I think it would be highly improper that every assault and battery upon a slave should be considered an indictable offence ; because the person making it might have matter of excuse or justification on his side, which could not be used as a defence for committing an assault and battery upon a free person. But where an assault and battery is committed upon a slave without cause, lawful excuse, or without sufficient provocation, I think it amounts to an indictable offence. Much depends upon the circumstances of the case when it happens ; these circumstances are not set forth in this case, and I think it material that they should appear. I therefore think, the judgment of the court below should be reversed, and a new trial granted for that purpose.

Henderson, J. concurred.

4.

THE STATE v. MANER. Spring T. 1834. 2 Hill's Rep. 453.; S. P. HILTON v. CASTON, 2 Bailey's Rep. 98.; WHITE v. CHAMBERS, 2 Bay's Rep. 70.; STATE v. CHEATWOOD, 2 Hill's Rep. 459.

Per Cur. *O'Neill, J.* The criminal offence of assault and battery cannot, at common law, be committed on the person of a slave. For notwithstanding for some purposes a slave is regarded in law as a person, yet generally he is a mere chattel personal, and his right of personal protection belongs to his master, who can maintain an action of trespass for the battery of his slave.

The master may sue for the battery of his slave.

There can be therefore no offence against the state for a mere beating of a slave unaccompanied by any circumstances of cruelty, or an attempt to kill and murder. The peace of the state is not thereby broken ; for a slave is not generally regarded as legally capable of being within the peace of the state. He is not a citizen, and is not in that character entitled to her protection.

5.

STATE V. MANER. Spring T. 1834. 2 Hill's Rep. 453.

And a person may be indicted for an assault with intent to kill a slave.

The defendant was indicted for an assault and battery, with an intent to murder a slave. *O'Neal J.* held, that although at common law no indictment lay for an assault and battery upon a slave, yet by the act of 1821., Acts, p. 12. an assault with an intent to murder a slave is indictable. The act of 1821., changing the murder of a slave from a mere misdemeanor, which it was under the act of 1740, to a felony, and the attempt to commit a felony, whether by statute or common law, is a misdemeanor, punishable by fine and imprisonment, at the discretion of the court.

6.

THE STATE V. MANN. Dec. T. 1829. 2 Devereaux's North Carolina Rep. 263.

The master is not liable to an indictment for a battery committed upon his slave.

The defendant was indicted for an assault and battery upon Lydia, the slave of one *Elizabeth Jones*. On the trial it appeared, that the defendant had hired the slave for a year; that during the term the slave had committed some small offence, for which the defendant undertook to chastise her; that while in the act of so doing, the slave ran off; whereupon the defendant called upon her to stop, which being refused, he shot at and wounded her. The judge in the court below charged the jury, that if they believed the punishment inflicted by the defendant was cruel and unwarrantable, and disproportionate to the offence committed by the slave, that in law the defendant was guilty, as he had only a special property in the slave. A verdict was returned for the state, and the defendant appealed.

Per Cur. Ruffin, J. A judge cannot but lament, when such cases as the present are brought into judgment. It is impossible that the reasons on which they go can be appreciated, but where institutions similar to our own exist, and are thoroughly understood. The struggle, too, in the judge's own breast between the feelings of the man, and the duty of the magistrate, is a severe one, presenting strong temptation to put aside such questions, if it be possible. It is useless, however, to complain of things inherent in our political state. And it is criminal in a court to avoid any responsibility which the laws impose. With whatever reluctance, therefore, it is done, the court is compelled to express an opinion upon the extent of the dominion of the master over the slave in North Carolina. The indictment charges a battery on Lydia, a slave of Elizabeth Jones.

Upon the face of the indictment, the case is the same as *The State v. Hall*, 2 Hawks' Rep. 582. No fault is found with the rule then adopted, nor would be, if it were now open. But it is not open; for the question as it relates to a battery on a slave by a stranger is considered as settled by that case. But the evidence makes this a different case. Here the slave had been *hired* by the defendant, and was in his possession; and the battery was committed during the period of hiring. With the liabilities of the hirer to the general owner, for an injury permanently impairing the value of the slave, no rule now laid down is intended to interfere. That is left upon the general doctrine of bailment. The inquiry here is, whether a cruel and unreasonable battery on a slave, by the hirer, is indictable. The judge below instructed the jury, that it is. He seems to have put it on the ground, that the defendant had but a special property. Our laws uniformly treat the master or other person having the possession and command of the slave, as entitled to the same extent of authority. The object is the same, the service of the slave; and the same powers must be confided. In a criminal proceeding, and indeed in reference to all other persons but the general owner, the hirer and possessor of the slave in relation to both rights and duties, is, for the time being, the owner. This opinion would, perhaps, dispose of this particular case; because the indictment, which charges a battery upon the slave of Elizabeth Jones, is not supported by proof of a battery upon defendant's own slave; since different justifications may be applicable to the two cases. But upon the general question, whether the owner is answerable *criminaliter*, for a battery upon his own slave, or other exercise of authority or force, not forbidden by statute, the court entertains but little doubt. That he is so liable, has never been decided; nor, as far as is known, been hitherto contended. There has been no prosecutions of the sort. The established habits and uniform practice of the country in this respect, is the best evidence of the portion of power deemed by the whole community requisite to the preservation of the master's dominion. If we thought differently, we could not set our notions in array against the judgment of every body else, and say that this, or that authority, may be safely lopped off. This has indeed been assimilated at the bar to the other domestic relations; and arguments drawn from the well-established principles, which confer and restrain the authority of the parent over the child, the tutor over the pupil, the master over the

apprentice, have been pressed on us. The court does not recognise their application. There is no likeness between the cases. They are in opposition to each other, and there is an impassable gulf between them. The difference is, that which exists between freedom and slavery—and a greater cannot be imagined. In the one, the end in view is the happiness of the youth, born to equal rights with that governor, on whom the duty devolves of training the young to usefulness, in a station which he is afterwards to assume among freemen. To such an end, and with such a subject, moral and intellectual instruction seem the natural means; and for the most part, they are found to suffice. Moderate force is superadded, only to make the others effectual. If that fail, it is better to leave the party to his own headstrong passions, and the ultimate correction of the law, than to allow it to be immoderately inflicted by a private person. With slavery it is far otherwise. The end is the profit of the master, his security and the public safety; the subject, one doomed in his own person, and his posterity, to live without knowledge, and without the capacity to make any thing his own, and to toil that another may reap the fruits. What moral considerations shall be addressed to such a being, to convince him what, it is impossible but that the most stupid must feel and know can never be true; that he is thus to labor upon a principle of natural duty, or for the sake of his own personal happiness, such services can only be expected from one who has no will of his own; who surrenders his will in implicit obedience to that of another. Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect. The power of the master must be absolute, to render the submission of the slave perfect. I most freely confess my sense of the harshness of this proposition. I feel it as deeply as any man can. And as a principle of moral right, every person in his retirement must repudiate it. But in the actual condition of things, it must be so. There is no remedy. This discipline belongs to the state of slavery. They cannot be disunited, without abrogating at once the rights of the master, and absolving the slave from his subjection. It constitutes the curse of slavery to both the bond and the free portions of our population. But it is inherent in the relation of master and slave. That there may be particular instances of cruelty and deliberate barbarity,

where in conscience the law might properly interfere, is most probable.

The difficulty is to determine, where *a court* may properly begin. Merely in the abstract it may well be asked, which power of the master accords with right. The answer will probably sweep away all of them. But we cannot look at the matter in that light. The truth is, that we are forbidden to enter upon a train of general reasoning on the subject. We cannot allow the right of the master to be brought into discussion in the courts of justice. The slave, to remain a slave, must be made sensible that there is no appeal from his master; that his person is, in no instance, usurped; but is conferred by the laws of man, at least, if not by the law of God. The danger would be great indeed, if the tribunals of justice should be called on to graduate the punishment appropriate to every temper, and every dereliction of menial duty. No man can anticipate the many and aggravated provocations of the master which the slave would be constantly stimulated, by his own passions, or the instigation of others, to give; or the consequent wrath of the master, prompting him to bloody vengeance, upon the turbulent traitor; a vengeance generally practised with impunity, by reason of its privacy. The court, therefore, disclaims the power of changing the relation in which these parts of our people stand to each other.

We are happy to see, that there is daily less and less occasion for the interposition of the courts. The protection already afforded by several statutes, that all powerful motive, the private interest of the owner, the benevolence towards each other, seated in the hearts of those who have been born and bred together, the frowns and deep execrations of the community upon the barbarian, who is guilty of excessive and brutal cruelty to his unprotected slave, all combined, have produced a mildness of treatment, and attention to the comforts of the unfortunate class of slaves, greatly mitigating the rigors of servitude, and ameliorating the condition of the slaves.

The same causes are operating, and will continue to operate with increased action, until the disparity in numbers between the whites and blacks shall have rendered the latter in no degree dangerous to the former, when the police now existing may be further relaxed. This result, greatly to be desired, may be much more rationally expected from the events above alluded to, and now in process, than from any rash expositions of abstract truths, by a judiciary tainted with a false and fanatical philanthropy, seeking to

redress an acknowledged evil, by means still more wicked and appalling than even that evil. I repeat, that I would gladly have avoided this ungrateful question. But being brought to it, the court is compelled to declare, that while slavery exists amongst us in its present state, or until it shall seem fit to the legislature to interpose express enactments to the contrary, it will be the imperative duty of the judges to recognize the full dominion of the owner over the slave, except where the exercise of it is forbidden by statute. And this we do upon the ground, that this dominion is essential to the value of slaves as property, to the security of the master, and the public tranquility, greatly dependent upon their subordination; and, in fine, as most effectually securing the general protection and comfort of the slaves themselves. Judgment below reversed; and judgment entered for the defendant.

7.

SCIDMORE v. SMITH. Aug. T. 1816. 13 John's Rep. 322.

The statute penalty for harboring slaves and servants is cumulative.

Trespass for harboring the plaintiff's man servant. It was objected, that it ought to have been debt under the statute for the penalty.

Per Cur. The statute penalty for harboring slaves and servants, is cumulative, and does not destroy the common law remedy.

8.

BROWN and BOISSEAU. April T. 1810. 1 Munf. Rep. 288.

Justification in trespass.

Trespass for breaking the plaintiff's close, and beating his slaves. The defendants pleaded, jointly, not guilty. On the trial they offered testimony tending to show in mitigation of damages, that the plaintiff had given a general permission to Brown to visit his negro quarters, and chastise any of his slaves who might be found acting improperly. The court refused to hear the testimony, although the beating of the negroes by Boisseau, was in the presence of Brown, and with his assent. It was admitted, that no permission had been given to Boisseau. Verdict for plaintiff.

Per Cur. *Tucker, J.* The evidence was, in my opinion, most properly rejected. *Roane and Fleming, Js.,* concurred.

(B.) FOR MAIMING OR KILLING HIM.

1.

CRAWFORD v. CHENEY. Sept. T. 1824. 15 Martin's Louisiana Rep 142.

Per Cur. Porter, J. This is an action brought to recover the price of a negro whom the plaintiff charges the defendant with having shot and killed. The evidence on which the jury found a verdict, comes up on the record, and the defendant renews here, a motion which he unsuccessfully made in the court below, for a new trial, on the ground of the finding being contrary to law and evidence. The testimony, it has been argued, is weak, and it is perhaps so; but the act charged here is one rarely committed in presence of witnesses; and the most that can be expected in cases of this kind, is the presumptions that result from circumstances. A most respectable jury, who knew the parties, have found a verdict in favor of the plaintiff, and we are unable to say the evidence authorizes us to reverse the judgment rendered therein. We believe justice has been done, and when the proceedings of the inferior court terminate there, as we think they have in the instance before us, a stronger case than this must be presented, to induce us to send the cause to a new trial. Judgment affirmed.

In a suit for killing a slave presumptive evidence supports the verdict.

2.

JOURDAN v. PATTON. July T. 1818. 5 Martin's Louisiana Rep. 615.

Per Cur. Mathews, J. The plaintiff claims damages for an injury done to one of her slaves, by one of the defendant's. She obtained judgment; and the defendant appealed. The injury done to the slave was of such a nature as to render him wholly useless: his only eye having been put out. The parish court decreed that the plaintiff should recover twelve hundred dollars, the supposed value of the slave, and a further sum of twenty-five dollars a month, from the time he was deprived of his sight; and that the defendant should pay the physician's bill and two hundred dollars for the sustenance of the slave during his life, and that he should remain for ever in the possession of the plaintiff. We are of opinion, that this judgment is erroneous, in giving damages for the full value of the slave, and compensation for the loss of his labor, from the time he became blind, during an undetermined period.

If on an injury to his slave the plaintiff recovers his full value, the property is transferred to the defendant, on payment of the judgment.

Further, it is thought to be erroneous, in decreeing that the defendant should pay two hundred dollars for the subsistence of the slave, and that he should remain forever in the possession of the plaintiff. The most that could have been equitably claimed, in addition to the full value of the slave, was legal interest thereon ; which, though it could not be given as interest, upon an uncertain and unliquidated sum, might have been taken into view, in estimating and fixing the damages. In the present case, from a comparison of the testimony, as to the value of the slave, we are of opinion that full and complete indemnity has been given for a total loss. When the defendant shall have paid the sum thus decreed, we are of opinion that the slave ought to be placed in his possession, deeming that the judgment making full compensation to the owner operates a change of property. In this view of the case, that part of the judgment of the parish court, which orders the defendant to pay two hundred dollars, is evidently erroneous. The principle of humanity, which would lead us to suppose that the mistress, whom he had long served, would treat her miserable blind slave with more kindness than the defendant, to whom the judgment ought to transfer him, cannot be taken into consideration in deciding this case. Cruelty and humanity ought not to be presumed against any person. A remedy for them can only be applied, when they are legally proven. The judgment of the parish court being erroneous, in these points, it is ordered, adjudged and decreed, that it be annulled, avoided, and reversed ; and this court, proceeding to give such judgment as, in their opinion, ought to have been given in the court below, it is further ordered, adjudged, and decreed, that the plaintiff recover from the defendant the sum of twelve hundred dollars, as an indemnification for the value of the slave, and that she shall further recover the amount of all expenses incurred for the attendance and treatment of the slave, with costs of suit in the inferior court.

S.

STATE V. CHEATWOOD. Fall T. 1834. 2 Hill's Rep. 459.

Indictment for the murder of a slave under the act of 1821.

Charging
the crime
in the
words of
the statute.

The defendant was convicted, and moved in arrest of judgment, on the ground that the indictment did not charge the crime in the words of the statute. The words in the statute were " wilfully, deliberately, and maliciously did murder ;" the words in the indict-

ment were, " wilfully, deliberately and maliciously did *kill* and murder."

Harper, J. decided the variance was immaterial.

4.

STATE V. CHEATWOOD. Fall T. 1834. 2 Hill's Rep. 459.

Harper, J. held, that the object of the act of 1821, relative to the murder of slaves, was to make the murder of a slave of the same grade and character as the murder of a white man or free-man at common law, and is to be made out by the same kind of proof.

Interpretation of the act of 1821 relating to murder.

5.

PERRIE V. WILLIAMS. May T. 1827. 17 Martin's Louisiana Rep. 695.

Per Cur. Mathews, J. This is an action of trespass, in which the plaintiff claims damages for the loss of a slave which she alleges to have been killed by the defendant's. They severed in their answers to the petition, and separate verdicts and judgments were rendered against them. Williams alone appealed. Two bills of exceptions are found in the record, which must be disposed of. The first is to the opinion of the judge, *a quo*, by which he authorized the plaintiff to strike out a count in her petition, which related to the conduct of the appellant as an overseer. The allegations in that part of the petition had no relation to the trespass in which the slave was destroyed; but only charged the overseer with gross negligence and mismanagement of the plantation and slaves of the appellee. It, in truth, was a declaration of facts, making an entire and distinct cause of action. This part of the suit was dismissed, by leave of the court, after the cause was submitted to the jury; but not until Williams had been allowed to amend his pleas, by discontinuing a claim in recommendation for wages as overseer. Under such circumstances, and in pursuance of the code of practice, we are of opinion, that the court below did not err in permitting the plaintiff to discontinue that part of her suit which related to the neglect and bad conduct of the defendant as overseer.

In an action for damages for killing the plaintiff's slave, he may be permitted to strike out a charge of neglect in the defendant, in the management of his own farm.

THE STATE OF MISSISSIPPI v. JONES. June T. 1820. Walker's Rep. 83.

In the state of Mississippi murder may be committed by the killing of a slave, as well as by the killing of a free-man.

Per Cur. Clarke, J. The question in this case, arising in arrest of judgment, transferred on doubts from Adams superior court, is, whether, in this state, murder can be committed on a slave. Because individuals may have been deprived of many of their rights by society, it does not follow, that they have been deprived of all their rights. In some respects, slaves may be considered as chattels, but in others, they are regarded as men. The law views them as capable of committing crimes. This can only be upon the principle, that they are men and rational beings. The Roman law has been much relied on by the counsel of the defendant. That law was confined to the Roman Empire, giving the power of life and death over captives in war, as slaves, but it no more extended here, than the similar power given to parents over the lives of their children. Much stress has also been laid by the defendant's counsel, on the case cited from Taylor's Reports, decided in North Carolina; yet, in that case, two judges against one were of opinion, that killing a slave was murder. Judge Hall, who delivered the dissenting opinion in the above case, based his conclusions, as we conceive, upon erroneous principles, by considering the laws of Rome applicable here. His inference, also, that a person cannot be condemned capitally, because he may be liable in a civil action, is not sustained by reason or authority, but appears to us to be in direct opposition to both. At a very early period in Virginia, the power of life over slaves was given by statute; but Tucker observes, that as soon as these statutes were repealed, it was at once considered by their courts, that the killing of a slave might be murder. Commonwealth v. Dolly Chapman; indictment for maliciously stabbing a slave under a statute. It has been determined in Virginia that slaves are persons. In the constitution of the United States, slaves are expressly designated as "persons." In this state the legislature have considered slaves as reasonable and accountable beings, and it would be a stigma upon the character of the state, and a reproach to the administration of justice, if the life of a slave could be taken with impunity, or if he could be murdered in cold blood, without subjecting the offender to the highest penalty known to the criminal jurisprudence of the country. Has the slave no rights, because he is deprived of his freedom? He is still a hu-

man being, and possesses all those rights of which he is not deprived by the positive provisions of the law ; but in vain shall we look for any law passed by the enlightened and philanthropic legislature of this state, giving even to the master, much less to a stranger, power over the life of a slave. Such a statute would be worthy the age of Draco or Caligula, and would be condemned by the unanimous voice of the people of this state, where even cruelty to slaves, much less the taking away of life, meets with universal reprobation. By the provisions of our law, a slave may commit murder, and be punished with death, why then is it not murder to kill a slave ? Can a mere chattel commit murder, and be subject to punishment ?

Villeins, in England, were more degraded than our slaves. It is true, that formerly the murder of a villein was not punished with death, but neither was the murder of a freeman then so punished. The only difference between the freeman and the slave was in the magnitude of the fine. In England, killing a villein was as much murder as killing a lord. Yet villeins were then the most abject slaves, and could be bought and sold as chattels ; but because slaves can be bought and sold, it does not follow that they can be deprived of life. The right of the master exists not by force of the law of nature or nations, but by virtue only of the positive law of the state ; and although that gives to the master the right to command the services of the slave, requiring the master to feed and clothe the slave from infancy till death, yet it gives the master no right to take the life of the slave ; and if the offence be not murder, it is not a crime, and subjects the offender to no punishment. The taking away the life of a reasonable creature, under the king's peace, with malice aforethought, express or implied, is murder at common law. Is not a slave a reasonable creature ?—is he not a human being ? And the meaning of this phrase, *reasonable creature*, is a human being. For the killing a lunatic, an idiot, or even a child unborn, is murder, as much as the killing a philosopher ; and has not the slave as much reason as a lunatic, an idiot, or an unborn child ? All are in the king's peace, except alien enemies, *flagrante belli*. A distinction once existed in England, between the killing a Dane and a Saxon ; but even in Coke's time the killing any rational being was murder. Jews were then regarded in a light more odious than the most abject slave ; yet to kill them was murder. So, to kill one attainted, or an outlawed felon, or even an alien enemy, except in battle, might be

murder. The term, "king's peace," means the place where the crime is committed, the actual venue, and not a particular class of human beings.

At one period of the Roman history, a history written in the blood of vanquished nations, slaves were regarded as captives, whose lives had been spared in battle, and the savage conqueror might take away the life of the captive, and therefore he might take away the life of the slave. But the civil law of Rome extirpated this barbarous privilege, and rendered the killing a slave a capital offence. When the northern barbarians overran Southern Europe, they had no laws but those of conquerors and conquered, victors and captives; yet, even by this savage people, no distinction was recognized between the killing, in cold blood, a slave or a freeman. And shall this court, in the nineteenth century, establish a principle too sanguinary for the code even of the Goths and Vandals, and extend to the whole community, the right to murder slaves with impunity?

The motion to arrest the judgment must be overruled.

7.

COMMONWEALTH v. CARVER. June T. 1827. 5 Rand's Rep. 660.

A negro slave is protected by the act of 9th Feb. 1819, against unlawful shooting, stabbing, &c. by a free person.

The prisoner was indicted for feloniously, maliciously, and unlawfully shooting, with intent to maim, disfigure, disable, and kill, a negro man slave of the name of Armistead, the property of Andrew Houten, under the act of 9th of February, 1819. The judge doubted whether a negro slave is the subject or person on which the offence created, and the penalties prescribed by the act can be committed or incurred, adjourned the case to the general court.

The Court. Brockenbrough, J., after referring to Dolly Chapple's case, 1 Virg. Cas. 184., declared, that a slave was a person on whom the offence of stabbing and shooting might be committed; and that the act was intended to protect slaves as well as free persons from such outrages.

It may be further remarked, that there appears no reason, arising from the relative situation of master and slave, w^hy a free person should not be punished as a felon for maiming a slave. Whatever power our laws may give to a master over his slave, it is as important for the interest of the former, as for the safety of the latter, that a stranger should not be permitted to exercise an unrestrained and

lawless authority over him. The opinion of the court is, that judgment ought not to be arrested.

8

FIELDS V. THE STATE OF TENNESSEE. Jan. T. 1829. 1 Yerger's Rep. 156.

Whyte, J. The plaintiff in error was indicted in the circuit court of the county of Maury, for the murder of a negro man slave, named Peter, the property of a certain David Jeffries.— Upon the indictment he pleaded not guilty. The jury found him not guilty of the murder as charged in the bill of indictment, but guilty of the manslaughter, in feloniously slaying the negro slave Peter.

The felonious slaying of a slave, without malice, is manslaughter.

Upon the verdict it was moved, for the plaintiff in error by his counsel, that no judgment should be rendered against him, because the jury found him guilty of manslaughter only, which crime, where the person slain was a slave, does not in point of law exist. The court overruled the motion in arrest of judgment, and passed sentence upon him, that he be burned in the brawn of the left hand, be imprisoned thirty days, and pay the costs of the prosecution. From which judgment an appeal, in the nature of a writ of error, was taken to this court. It was contended for the plaintiff in error, in a very able and learned argument, that the common law of England ought not to guide the investigation, and govern the decision of this question; for that slavery never existed in England, and, therefore, the principles of the common law could not have in view, nor in any part be founded upon a state of society which had no existence in that country. That, although the colonial government of England, or Great Britain, extended to these states before the revolution, yet the law of nations, on which slavery depended, and the municipal regulations of each government on the subject, formed the code of laws by which all questions regarding slaves should be governed; and, therefore, the law of nations, with municipal regulations, or legislative acts of the colonial government of North Carolina before the revolution, and the acts of assembly of North Carolina and Tennessee since the revolution, should govern this case. That by the law of nations, as it formerly existed, the master had an absolute and unlimited power over the life and fortune of his slave; that in later times, municipal law has abridged this power of the master, and

produced amelioration in the state of slaves. But this amelioration or abridgment of the power of the master, is only co-extensive with the municipal assumption, leaving with him that portion not expressly taken away. From this view it follows, that the wilfully or maliciously killing, with malice aforethought, a negro or mulatto slave, being made murder, and the offender punishable with death, without benefit of clergy, by the act of 1799, ch. 9., does not include or embrace any other kind of homicide but the one mentioned ; and the jury in the present case, having found the plaintiff in error guilty of manslaughter, being a different and inferior grade to that stated in the act, is not an offence within it ; and there being no other act of assembly, making a felonious and wilful killing of a slave punishable, the judgment of the circuit court is erroneous. We cannot concur with the view the learned counsel has taken of this case, and assent to the position, that the common law, or its principles, are not to have an influence in the decision of this case. It is true, as observed in the argument, that pure and proper slavery never subsisted in England, giving the master the power of life and death over the slave ; but a species of slavery, or servitude, existed there from the earliest times ; the subjects of it were not styled slaves, but villeins ; and their state and circumstances much resemble that of our slaves at the present day. These villeins were either regardant, that is, annexed to the manor or land, or villeins in gross, or at large ; that is, annexed to the person of the master, or lord, as he is called in the books. Both classes were transferrable by deed from one corner to another ; neither could leave their master without his permission ; and if they ran away, or were purpoined from him, might be claimed and recovered by action like beasts and other chattels.

The children of villeins were also in the same state of bondage with their parents, but followed the condition of their father—free, if he was free ; and villein, if he was villein ; differing in that respect with the condition of our slaves, when the maxim of the civil law, that *partus sequitur ventrem* prevails. Neither could the villein acquire property for his own benefit, the maxim applying *quicquid acquiritur servo, acquiritur domino* ; nor could he support an action against his master for beating him, which privilege the master could always exert with impunity, as no civil remedy lay for him against his lord. Such was the civil relation existing between the

master and vellein at the common law. See 2 Black. Com. 93, 94.; Litt. S. 129, 194.; Co. Litt. 117. a. But whilst the common law noticed and sanctioned these harsh characteristics of the vellein's condition, it guarded his person as an object of the criminal law; and protected him against the atrocious injuries of his lord; for he might not kill or maim him; and for these he shall be indicted at the suit of the king, 2 Black. Com. 94.; 1 Inst. 116. b.; Lit. sec. 194.

This short review of the condition of vellein at the common law exhibits a strong resemblance to the condition of our slaves; the principal feature of both are the same, and differing only in some *minutiae*, which do not require to be noticed. Why then do not the principles of the common law apply, as far as the state or condition is similar, the one to the other? Our ancestors brought, upon their emigration, the common law with them as their rule of action, and still retain it where applicable. So it was declared upon the first settlement of North Carolina, in the act of 1715, ch. 31., sec. 5. So, also, after the revolution in 1778, it is again declared, "that all such parts of the common law as were heretofore in force and use within this territory, as are not destructive of, repugnant to, or inconsistent with, the freedom or independence of this state, and the form of government therein established, and which have not been otherwise provided for, in the whole or in part not abrogated, repealed, or expired, are hereby declared to be in full force in the state." Act of April, 1778, ch. 5. sec. 2.

By the common law, murder, according to Lord Coke, 3 Inst. 47., is "where a person of sound mind and discretion unlawfully killeth any reasonable creature, in being, under the king's peace, with malice aforethought, either express or implied;" manslaughter, by Blackstone, 4 Com. 191., is defined to be "the unlawful killing of another, without malice, either express or implied." Both these definitions include the vellein, and the negro or mulatto slave. Our act of assembly of 1799, ch. 9. sec. 1., enacts, "that if any person shall wilfully and maliciously, with malice aforethought, kill any negro or mulatto slave whatsoever, on due and legal conviction thereof, in any superior court of the district wherein such offence shall have been committed, be deemed guilty of murder, as if such person, so killed, had been a freeman, and shall suffer death without benefit of clergy; any law, usage or custom, to the contrary notwithstanding." This statute makes the same act murder, and punishable with death, which is so at the common law,

If it is asked then, why was this statute made if the same act was murder and punishable with death at the common law? it was made in consequence of the prior act of 1774, having enacted, that the killing a slave under such circumstances that would have constituted murder by a freeman doing so, should be punished only with twelve months' imprisonment for the first offence. This act having so far superceded the common law on the same matter, the legislature willing it, in 1799, that this act of 1774, should be repealed, and the common law be restored; instead of a repeal in terms, made an express provision on the same subject matter, operating as a repeal, and enacting that the killing, which by the act of 1774 was punishable only by twelve months' imprisonment, should be punishable with death. It is now said that by these acts no such crime exists in our law as manslaughter, or the wilfully and feloniously killing a slave; for that the municipal regulation of the courts, or, in other words, the acts of assembly, do not in terms, or otherwise, declare its existence. It is answered, that the legislature in the acts of 1774 and 1799, legislated upon a set of facts constituting murder; and the act of 1784 says, when the subject of them is a slave, the punishment is twelve months' imprisonment. Now, if after the passage of the act of 1784, it would be a correct construction to say, that as murder, which is a more heinous offence than manslaughter, is made only punishable by imprisonment for twelve months, therefore, the less offence of manslaughter does not exist; or if it does exist, is not punishable at all. Would it not be an equally correct construction to say, that the repeal of this act of 1774, by the act of 1799, was a repeal of its imputed consequences and construction, as well as of its express enactments. But the case is, that neither the act of 1774, or the act of 1799, speak of manslaughter, or the state of facts which constitute the offence of manslaughter in law. On the other hand, it may be safely said, that if there is no act of assembly of North Carolina, or of the territorial government, or of our own government, the offence of manslaughter, when a negro or mulatto slave is the subject of it, from our criminal code, exists by the common law: because it is the unlawful killing of a human being; and this definition of the offence is as well applicable to the negro or mulatto slave, as the villein.

We have already seen, that by the common law, the villein was protected, as to his life and limbs, against the atrocity of the lord or owner. This case is that of a stranger committing the act, and not the lord or owner. This matters not, for the law is the same

in both cases : if there were a difference by analogy to their civil rights, it would operate against the stranger. Thus, an action of assault and battery cannot be supported by the villein against his lord, for, being his *servant*, he had a right to beat him at pleasure, not extending to life or member, but to the like action by the villein. *Versus non dominum, non valebit ei exceptio, quia est servus alienus, ex quo nihil ad ipsum, utrum liber sit non servus.* If being his *servus*, was a good answer by the lord, in an action of assault and battery, but not available for him on indictment for homicide or mayhem, still less must be that of *alienus servus* in the mouth of a stranger, upon the like indictment.

The judgment rendered in the present case is upon a verdict of the jury given on an indictment for murder, finding that the plaintiff in error is not guilty of the murder charged in the bill of indictment ; but he is guilty of manslaughter in feloniously slaying the negro slave, Peter. It is the same judgment that would have been rendered against the plaintiff in error, if the subject of the homicide had been a freeman, instead of a negro slave. There is no law authorizing any distinction between the two cases. There was no distinction at common law between the judgments in homicide, for the killing a freeman, and killing a villein. The words of lord Coke are express to this point ; he says, " he that killed his villein, should have the same judgment as if he killed a freeman." 1 Inst. 116. b. It may be also observed, that the finding of the jury in this case, is the usual finding upon a bill of indictment for murder, where the facts of the case admit of it, and is a proceeding at common law, and sanctioned by it. See 1 Black. Com. 48., where he says, " the common law, properly so called, is that law by which proceedings and determinations in the king's ordinary courts of justice are guided and directed."

Peck, J. Defendant was indicted in the circuit court of Maury county, for the murder of a negro slave. He pleaded not guilty ; and at the trial was found guilty of wilful and felonious slaying of the slave aforesaid.

The prisoner had his plea of clergy allowed, and judgment for the offence of manslaughter was pronounced against him ; from which judgment he has prosecuted this writ of error. It is now insisted, that the wilful and felonious slaying of a slave is not punishable ; and for this is cited, 2 Hayw. Rep. ; 1 Taylor Rep. ; Act of 179 : for the state, 1 Hawks' Rep. Murder, says sir Edward Coke, 3 Inst. 47., is when a man of sound memory, and of the

age of discretion, unlawfully killeth, within any county of the realm, any reasonable creature, *in rerum natura*, under the king's peace, with malice aforethought, either express or implied. Blackstone, in his Commentaries, vol. 4. p. 194, remarks : "at the crime of wilful and deliberate murder human nature starts with horror ;" and which, says he, "is, I believe, punished throughout the world with death." The Mosaic law and the precepts to Noah, are all so many denunciations against the crime. From remotest antiquity down to the present time, mankind, in deliberating upon it, have formed the same opinion. But it will be answered, none will disagree about the crime of murder. The question made is, whether or not the crime here found—that of slaying a slave—is a crime punished by the laws of this State ? Our act of the assembly of 1799, ch. 9., provides, "that if any person or persons shall, wilfully or maliciously, with malice aforethought, kill any negro or mulatto slave whatever, on due and legal conviction, he shall be deemed guilty of murder, as if such person so killed had been a freeman ; and shall suffer death without benefit of clergy." This act, it is said, creates the offence, and fixes the punishment for the murder of a slave ; and it is not thence to be inferred, that any other killing, not mentioned in the act, was designed to be punished, or even considered as a crime. This argument is founded on what is said to be the law of nations ; that captives taken in war are subject to be made slaves ; and the captor has a right to dispose of the life of his captive, and for this Vattel is cited. The position above assumed, I conceive, is too broad. When a captive has laid down his arms and submitted, there is then no necessity for disposing of his life ; and nothing but necessity or unavoidable accident, will excuse taking away life. If no necessity exists for destroying a captive human being, how can it be pretended the act can be excused. Vattel, 421.

Christian nations do not consider themselves at liberty to sport away the lives of captives. At this day the act would be reprobated and denounced as fit only for the savage state. Indeed, christian example has greatly softened, in this respect, the ferocious savage in his wars. It has been argued by a jurist, that the slave of this country, when taken in his own country, was subject to this law ; that the dealer in the slave trade purchased the captive there with this burden attached to him, and hence it is, that the law affords him no protection against the attempt of the master upon his life. That the law of a pagan or savage nation, should

have been acquired with the commodity purchased and ferried over the wave with it, is a doctrine too monstrous for my mind ; for had the slave on his passage touched in Britain, the common law would have protected his life against the assault of his master. That common law was in force in the colonies. The attempt to impart and commit a principle so opposed to those founded in common law and suited to christian communities, would be as futile as the attempt to unite oil with water. How can it be urged, that of necessity the horror of slavery must not abate when introduced here, from the degraded condition it was found in where it had its origin. If it is true, as argued, that we bring the law of the country with us ; then a slave brought from those islands, where it is said the captor sometimes turns cannibal, kills and makes a repast of his captive—for the same reason, having the law and example of that country before us, it could be as safely followed here. And, ludicrous as this may seem, it falls exactly within the train of that argument, which can only be supported by supposing the slave on a footing with the live stock on a farm.

I have been taught that christianity is a part of the law of the land.

The four gospels upon the clerk's table admonish me it is so every time they are used in administering oaths. If the mild precepts of christianity have had the effect to ameliorate the condition of this order of people, it is expected that we must recede from the improvement obtained, and retire more into the dark, and become in government, partly christian and partly pagan, because we own pagans or savages for our property ! If the argument on the other side is correct, this consequence would follow : the whole train of thinking is erroneous, and it is not difficult to trace the origin of the error. Those in early times, concerned in the traffic of slaves, were unfeeling and savage. The page of history proves that thousands fell victims to masters, some before, and some after landing. Man is imitative. The cruelty first practised was followed up, and a bad custom against all law was winked at. But in later times, when murder did cry out, justice demanded her recompense for crime ; and some were indicted ; acts of assembly had been passed ; and the offence having been so common, it was pretty natural to overlook the principle of the common law, and follow such rules as were found in the statute ; but common law, because of this oversight, had not ceased. It was regained, and greatly to the honor of the bench of N. Carolina.

This statute of ours has not repealed the law as it stood before the passage of this act. It is much more sensible to say, it is affirmative of the common law; an attempt of the legislature to again bring into action what courts had, unfortunately, but too long permitted to slumber.

What is conclusive with me, that this is all that was intended, is, the punishment inflicted by the act. For wilful and malicious murder, the offender is to suffer death without the benefit of clergy—the former punishment. Say, that for a time the law, as it stood before, had been misconstrued or overlooked, if the court had revived and restored it to its pristine vigor, would not, in its restoration, the crime of manslaughter have been restored also? Certainly it would. If, then, the act is silent as to manslaughter, and there be no repeal of former laws, what pretence is there to say, that manslaughter is done away? I admit this will depend upon the question, whether the killing a slave with malice, was an offence at common law. But does not the common law definition cover the case? Is it the wilful and malicious killing of a *reasonable creature*? If he be such, then the reasoning is unsound and inconclusive, which offers as an excuse, that such reasonable creature is a slave. It is well said by one of the judges of North Carolina, that the master has a right to exact the labor of his slave; that far, the rights of the slave are suspended; but this gives the master no right over the life of the slave. I add to this saying of the judge, that law which says thou shalt not kill, protects the slave; and he is within its very letter. Law, reason, christianity and common humanity, all point out one way.

Catron, J., concurred. Judgment affirmed.

9.

BOOTH et al. v. SCHOONER L'ESPERANZA. March T. 1798.
Bee's Rep. 92.

Judge Bee held, that the owner of a slave could maintain a suit for his wages as a mariner on board a coasting vessel. That it had been so decided on solemn argument, in *Stone v. Godet*, in the district court of South Carolina.

(C.) FOR PROPERTY GIVEN TO, OR CONTRACTS MADE BY THE
SLAVE.

1.

LIVAUDAIS' HEIRS v. FON et al. May T. 1820. 8 Martin's
Rep. 161.

Per Cur. Mathews, J. This is a suit brought by the appellees, plaintiffs in the court below, to recover the amount of a note, given by the defendants to Frosina, a slave of the plaintiffs, by which they promised to pay to her four hundred dollars. Payment is resisted on the ground of the promise having been made in error, and, consequently, having created no obligation, it being a contract without cause or consideration. The execution of the note raises a presumption of a just consideration, which must be defeated by proof to the contrary, on the part of the defendants. This they have attempted by the production of a testament made by one Durand, in which he instituted Pedro, his bastard child by Frosina, the slave abovementioned, his heir, and appointed Fon, one of the appellants, his testamentary executor; and by the introduction of testamental proof, showing that the child died in 1812, &c. Admitting that all this evidence was properly received in the present suit against *Fon*, and another person, on their joint note, which is by no means clear, we are of opinion, that it is not sufficient to support the defendant's objections to payment. For any thing, which appears to the contrary, the boy Pedro, the instituted heir of Durand, was the slave of the plaintiffs, or their ancestor, and took the instrument under the will for their benefit, in conformity with the laws then in force. The right to the succession being thus vested in them, they might have instituted an action for its recovery against the executor. This they have not done, but now sue upon a note given by him, and another to their slave Frosina; being, as the appellants insist, a liquidation of Pedro's succession to his mother, which she could not take in consequence of her state of slavery. The former having died since the promulgation of the civil code, that statute, 40 art. 17. and 158., art. 64., is relied on to establish the error, and consequent nullity of the defendant's promise to pay the sum to Frosina, as stipulated in their note.

A master
may sue
for what is
due to his
slave.

According to the first of these provisions, being a slave, she was incapable to contract any kind of engagement. It is true, that she

could not bind herself in any respect, because she was without a will ; nor could she have entered into any contract which would be binding on her owner, unless under special authorization by him. But it does not appear to us to follow, as a necessary consequence, that the master cannot claim the benefit of a lawful and voluntary engagement made in favor of his slave, on an equitable consideration, by a person capable of contracting.

By the last article cited, slaves are declared to be incapable of transmitting their estates, as intestate, or of inheriting from others. They certainly can transmit nothing, for they do not possess any thing in their own right ; neither can they inherit, clearly not for themselves ; and perhaps not for the benefit of their masters. The same incapacity is attached to them, of giving and receiving by donation *inter vivos*, or *causa mortis* ; they therefore cannot take by will for themselves. In pursuance of these rules, Frosina could not succeed to the estate of her son ; but the owners had a right to claim it from the testamentary executor of Durand ; and having this right, it cannot properly be said that no cause or consideration exists for the note by which he promised to pay that amount, when it is seen that such promise enures to the benefit of those who have a just and legal claim to the succession of Pedro. Considering the note as a liquidation of this succession, there is sufficient cause for the contract thus made by the executor, and has been rightfully condemned to pay the sum therein stipulated ; but ought to be exonerated from any other or farther claim against him, on account of the estate willed by Durand to his bastard child.

2.

ROBINSON v. CULP. Nov. T. 1812. 1 Constitutional Court
Rep. of South Carolina, 231.

This was an action on the case, for procuring, persuading, and enticing a negro slave to depart and absent himself from the ser-

By Aikin's Alabama Dig. p. 109., it is declared, "that any person or persons being convicted of harboring, or concealing any negro or negroes belonging to any other person or persons, whatsoever, or suffering the same to be done with his consent or knowledge, shall be fined in a sum not exceeding seven hundred dollars, and

vice of his master. The presiding judge stated to the jury, that an act of assembly of this state made it a felony for a person to inveigle, entice, &c., a negro slave to absent himself from his master ; and, therefore, if they were of opinion that the defendant in this case had committed the act clandestinely and secretly, he was guilty of a felony, and the plaintiff could not recover ; because the civil action was merged in the crime. The jury found for the defendant, and this motion is made to set aside that verdict, and to grant a new trial, on the ground of misdirection by the court.

Nott, J. I can see no good reason why a civil action should be merged in a felony in any case where property is involved, and the action is for the property itself. In England, a conviction for felony works a forfeiture of property, and to suffer an action to be brought before conviction, would discourage prosecutions, and deprive the king of this part of his revenue ; and, therefore, a person is not permitted to sue until after conviction. But no such reason exists here, because there is no forfeiture. But that is not the only ground upon which I have formed my opinion.

I do not think the question ought to be tried in this collateral way ; and much less ought it to be in the defendant's mouth, to discharge himself from the action by saying, he had committed a felony. Whenever a person sets forth a good cause of action, in his declaration, and supports his allegations by proof, I think he ought to recover, notwithstanding the testimony may be such as to induce a belief that the transaction is felonious. A person ought never to be convicted of a felony, except on a direct charge of a crime, and by a jury charged to try the offence. If the plaintiff had charged a felony on the face of his declaration, it would have been a question on which it is unnecessary to give any opinion at present. And yet, I think he might make use of the very words of the act, and still be entitled to recover. In an action brought to try the right of property, the words of the act may be proper words to use in the declaration. Suppose it should be proved that the defendant committed the act in a clandestine, secret manner ; still his object might be only to get possession of

shall be imprisoned not less than one calendar month, nor exceeding six calendar months; and shall be liable in damages to the party injured, to be recovered by action on the case before any tribunal having competent jurisdiction." And similar enactments are to be found in the statute books of the other states.

property to which he had a claim, and not with a felonious intention. In an action to try the right of property, *quo animo*, makes no part of the case. And it is no answer to say, that if the defendant has any right, he may show it; for after the plaintiff has established his right, the defendant may be satisfied that it is in vain to contend farther. Indeed, in such a case, it would be for his interest not to do it, if he might thereby give the case the appearance of felony, and nonsuit the plaintiff, after having established a right to the property. I am of opinion a new trial ought to be granted.

Justices *Bay* and *Grimke* concurred.

(XVIII.) OF RUNAWAY OR FUGITIVE SLAVES.

1.

GLEN v. HODGES. Jan. T. 1812. 9 John's Rep. 67.

A fugitive slave contracting a debt in another state, will not justify the creditor forcibly taking him on a process out of the hands of his master who has reclaimed him—the contract with the slave being void.

Trespass for taking the plaintiff's man slave. The plaintiff, the owner of the slave, went into Vermont after his runaway slave, who had fled from him in this state, and had resided in Rutland, Vermont, four years as a freeman. After the slave was taken by the plaintiff, the defendant took out an attachment against the slave for debt, on which he was arrested and forcibly taken out of the plaintiff's possession, and sent to prison. The judge who tried the cause thought the plaintiff was not entitled to recover, and a nonsuit was entered, with liberty to move the court to set it aside.

Per Cur. There is no doubt the negro was the property of the plaintiff, and had run away from service in Vermont. He was held to service or labor under the laws of this state, when he escaped, and the escape did not discharge him; but the master was entitled to reclaim him in the state to which he fled. This is according to the provision in the constitution of the United States, art. 4. § 2., and the act of Congress of the 12th of Feb. 793., Laws U. States, vol. 2. p. 165., prescribes the mode of reclaiming the slave. It not only gives a penalty against any person who shall knowingly and willingly obstruct the claimant in the act of reclaiming the fugitive, but saves to such claimant "his right of action for any injury" he may receive by such obstruction. The plaintiff was,

therefore, in the exercise of a right, when he proceeded to reclaim the slave ; and the simple question is, whether the defendant is not responsible in trespass, for rescuing the slave, though he did it under the form and color of an attachment for a debt, alleged to have been contracted with him by the slave. The negro being a slave, was incapable of contracting so as to impair the right of his master to reclaim him. A contrary doctrine would be intolerable, so far as it respects the security of the owner's right, and would go to defeat the provision altogether. The defendant, therefore, contracted with the negro, and sued out the attachment at his peril. It was a fraud upon the master's right. The fact being established, that the negro was a fugitive slave, the attachment was no justification to the party who caused it to be sued out. This must have been so adjudged, if the point had been raised in Vermont, because the entering into a contract with such slave, and the endeavor to hold him under that contract, contravened the law of the United States, which protects the master or owner of fugitive slaves in all his rights as such owner. If the slave had committed any public offence in Vermont, and had been detained under the authority of the government of that state, the case would have been different, and the right of the master must have yielded to a paramount right. But the interference of any private individual, by suing out process, or otherwise, under the pretence of a debt contracted by the negro, was an illegal act, and void ; and there can be no objection to the action being brought here, though the act happened out of the state. The action is transitory.

Motion for a new trial granted.

2.

THE COMMONWEALTH v. HALLOWAY. January T. 1817.

3 Serg. & Rawle's Rep. 4.

Habeas Corpus to the keeper of the Philadelphia prison, at the instance of the master, to bring up the body of David Johnson, his slave, who had been committed for fornication and bastardy.

It was contended, that the master could not take away his slave charged with a crime. That it had been so decided by Judge Rush, in Nov. 1816, and before the Chief Justice, 1814.

Per Cur. Tilghman, Ch. J. From the evidence which has been given, we have no doubt of David Johnson being the slave of Mr. Frazier; and there would be no objection to delivering him up

A fugitive slave who has committed fornication and bastardy, will not be delivered to the master unless security be given to maintain the child.

to him, but for the commitment for fornication and bastardy. Fornication has always been prosecuted in this state as a crime. By the law of 1705, it was subject to the punishment of whipping, or the fine of 10 pounds, at the election of the culprit. The punishment of whipping has been since abolished; but the act of fornication is still considered as a crime; and where it is accompanied with bastardy, security must be given to indemnify the county against the expense of maintaining the child. It may be hard on the owner to give this security, or lose the services of the slave; but it is an inconvenience to which this kind of property is unavoidably subject. The child must be maintained; and it is more reasonable that the maintenance should be at the expense of the person who has a right to the service of the criminal, than at that of the people of this city, who have no such right. I am of opinion the prisoner should be remanded. *Yates and Gibson, Js.*, concurred.

3.

JARRETT V. HIGBEE. Oct. T. 1827. 5 Monroe's Rep. 546.

Taking up a slave as a runaway in good faith and upon reasonable ground is a justification.

Jarrett brought trespass against Higbee for taking and imprisoning his slave. Defendant pleaded that he apprehended the slave as a runaway, &c. The defendant admitted, that when he took the slave up, he produced the following pass or paper from his master:

"Know all men by these presents, that I, J. Jarrett, of Livingston, and state of Kentucky, do agree that this black man Allen, do bargain and trade for himself until the first day of May next; and also for to pass and repass from Livingston county, Kentucky, to Monongahela county, state of Virginia, Morgantown, and then to return home to the same Livingston county, Kentucky, again, near the mouth of Cumberland river, Smithland. Given under my hand this 26th day of Sept. 1822."

The plaintiff moved the court to instruct the jury, that if they believed that the slave was possessed of the pass produced in evidence, and did exhibit it to the defendant when taken up, and that the same was executed and delivered to the slave by the master, it should have protected him, and his arrest was illegal. The court refused to give the instructions prayed for; but instructed the jury, that if the defendant took up the slave in good faith, having reasonable grounds to suspect he was a runaway, he was justifiable.

Per Cur. *Bibb, Ch. J.* The instructions asked, supposes that Higbee, and all others, were bound at their peril to yield obedience

to the permit contained in the paper exhibited. To this the court cannot assent. The paper contains, on the part of the plaintiff, an agreement that the slave shall bargain and trade for himself, from the 26th September, till the first of May, and pass and repass from Livingston in Kentucky, to Morgantown in Virginia. However well satisfied the master may have been to turn his slave loose upon society, to bargain and trade for himself, and to ask society to it, yet it does not follow that society was bound to submit to it.

Without attempting to define what shall be the form of a lawful pass, or permit, to a slave, it may be safely affirmed, that no paper can be such a one, which on its face is a violation of public policy, and the security of society; which shows that the slave is going at large, to do that which is forbidden expressly by the statute law. That slaves shall not be frivolously arrested, when proceeding on the lawful business of the owner, or when acting in their proper and lawful sphere, by permission of the owner, is due to the master and his right of property. That the master shall not let loose his slave, with a permit from him to violate the established order and economy prescribed by law in relation to slaves, is due to society. These interests of the master on the one hand, and of society on the other, are concerned in the question involved in this controversy. But without abridging the lawful powers of the master, to use his property in the slave, it may be safely declared that this paper given by the master in the slave violated that duty which he as owner owed to the laws and to society.

The paper contained the master's assent and permission to the slave to go at large from September to May; from Smithland to Morgantown, to bargain and trade for himself, contains an authority to hire himself, as well as to buy and sell, and deal in articles and commodities without a specification or limitation. These permissions, and such acts of the slave, are violations by master and slave, of the policy, spirit, and letter of the statute 16th Dec. 1802, against permitting slaves to go at large and hire themselves. 2 Dig. 1159.; and the 12th sect. of the act of 1789, 2 Dig. 1152., against buying, selling, or receiving to, or from, or by a slave without a note in writing from the master expressive of the article. To pass and repass from Smithland to Morgantown, from the extreme southwestern to the northeastern limit of the state, and beyond into Virginia, to range in this direction from September to May, bargaining and trading for himself, is certainly going at large in

hostility to the settled order intended to be maintained by our statutes. Such licenses would tend to beget idle and dissolute habits in the particular slaves so indulged, as well as in others, and lead to depredations upon the property of others, and to crimes and insubordination. To such licenses and indulgences society are not bound to submit; the master has no right to give such. Every person to whom such a permit was exhibited by a slave, might well suspect its authenticity. It was not a lawful pass or permit, it was a species of temporary and unlawful manumission; unlawful in its purpose and duration, wanting the solemn form, sanction, authentication, and safeguard, as a deed of emancipation, and by its terms and purposes, showing that the slave was not proceeding upon the lawful business of the master, but at the will and for the purposes of the slave himself.

4.

JARRETT v. HIGBEE. Oct. T. 1827. 5 Monroe's Rep. 546.

The court held, that reasonable grounds to suspect the slave a runaway will justify taking him up.

The warrant of commitment by the justice is evidence of probable cause.

5.

HUTCHINS v. LEE. Dec. 'T. 1827. Walker's Mississippi Rep. 293.

The provisions in the statute for the sale of runaway slaves, are merely directory, and a non-compliance with these provisions does not invalidate the sale. If the slave sell for less money, because of any neglect in the sheriff to perform his duty the remedy is by an action against the sheriff for damages.

Per Cur. Turner, J. In this case, we have been furnished with an elaborate and able report of the judge who presided at the trial of the cause in the Claiborne circuit court, which we here insert. This report is so full, and the subject placed in a view so perspicuous, that there is nothing left for this court but to give the case due consideration. After mature reflection, and a careful examination of the authorities cited in the report, I concur entirely with the opinion of the court below, and with the principles and reasons therein contained. The judgment of the court below is, therefore, affirmed.

Judges *Black* and *Winchester* concurred.

Report—By Hon. Judge CHILD.

Appeal from the circuit court of Claiborne county. As the decision under consideration in this case was made on the circuit by the judge of the first district, by art. 5. sec. 2. of the constitution, it becomes my duty to report to the supreme court the reasons upon which that opinion was founded. This was not a hasty, in-

considerate decision, made in the hurry of business at nisi-prius. On the contrary, it was made under all the advantages that an elaborate research of six months could bestow, surrounded with complete libraries, and with ample time for thought and reflection. The case is an action of detinue for a runaway slave, by the original owner against the vendee at sheriff's sale. The single point propounded for investigation and decision fully appears in the bill of exceptions which is made a party of the record.

The cause was considered by the circuit court in three aspects :

1. Upon the strength of decided cases in point, and the weight of authority to be found in analogous decisions.

2. As a vexed question, to be determined upon the reasons of the case, with a view to public policy, and the state of society, where the rule was to operate, as law hereafter, in similar cases.

3. As a new question, and difficult, when considered with a view to the past, present, and future sales of a similar nature in a slave holding state. On the part of the plaintiff, it was insisted upon the first point, that this was a naked power, not coupled with an interest, and that in order to make the sale valid, every pre-requisite to the creation and execution of the power should precede its completion ; and cited 4 Wheaton's Rep. 77. 79.; Williams v. Peyton, 4 Cranch's Rep. 403.; Steel's exr. v. Course, 9 Cranch's Rep. 64. ; Parker v. Rule's lessee, and Sugden on powers, were relied on. On the part of the defendant it was contended, that these cases in Wheaton and Cranch did not apply : because there, the decisions went entirely upon the ground of notice to the original proprietor, in whom the property remained until the sale had actually taken place ; but in the case of a runaway slave, or an estray, so soon as the time of the first publication expired, according to law the property in the runaway slave vested in the county, the same as an estray at common law, vested in the king, or lord of the liberty. Jacob, 441 ; 1 Black. Com. 297., and cases there cited. It is said an estray is any valuable animal that is not wild, found within a lordship, and whose owner is not known ; in which case if it be tried and proclaimed according to law, and not claimed by the owner within a year and a day, it belongs to the king, without even the equity of redemption. So, by our runaway slave laws, R. C. page 376-7., and Estray Laws, S. B. page 331., after being proclaimed according to law, in the case of a runaway slave, six months, and in the case of an estray twelve months, the slave, or estray, belongs to the county, to be sold according to law ; and

in both these cases the provisions of the statute are purely directory ; and whether complied with, or not, cannot affect the title of the vendor at such sale, without fraud ; who, upon the strictest rule of *caveat emptor* is only required to see the pre-requisites to the property vesting in the county, had been complied with, and preserve them as monuments of his title. In a much stronger case than the present, reported in 4 Dall. Rep. 220., the court say it has been urged, that there is no proof that advertisements of the sale were posted up at public places ; but if the sale was a fair one, we regard this as a very feeble objection.

The act of making such advertisements is the duty of the sheriff ; is a matter merely directory, and should not affect the title of a *bona fide* purchaser ; and I think the case would be a much harder one, if the original proprietor of a runaway slave could be permitted to disturb the title of a *bona fide* vendee at sheriff's sale, on account of irregularity in the sale, subsequent to the title vesting in the county. If the amount of sale has been diminished for want of legal notice to purchasers, his remedy, if any, is against the officers as in other cases. In this case, all the pre-requisites to vesting the title in the county, were complied with, and the plaintiff's claim is the amount of the proceeds of sale, after deducting costs, charges and commissions. One reason why the cases from Wheaton and Cranch do not apply here, is because those cases were decided upon the ground that there was a defect of notice to the proprietor : here the proprietor had a strict legal notice in every particular pre-requisite. But the most striking feature which redeems this case from the operation of all the authorities cited by the plaintiff, with reference to private special powers, is, that in those cases an actual sale in strict pursuance of the power, is necessary to a divestiture of title ; but in this case, the title is good before the pre-requisites of sale commenced. When an execution is placed in the hands of the sheriff, it constitutes a general lien upon all the property of the defendant ; and when a levy is actually made, the property is in the sheriff, *pro tanto*, for all the purposes of sale to satisfy the execution. And in such cases, the law protects *bona fide* purchasers without fraud, although the sheriff may render himself liable for misconduct. In accordance with this doctrine, it is laid down in 2 Bacon, 741 (a.) if upon his judgment, the plaintiff takes out a writ of *feri facias* and thereupon the sheriff sells a term for years to a stranger, and the judgment is afterwards reversed, the defendant shall only be restored to the money for which the

term was sold, and not the term itself; for by the writ, the sheriff had authority to sell, and if the sale may be avoided, afterwards, few would be willing to purchase under execution, which would render writs of execution of no effect.

2d. Although this doctrine contemplates the reversal of a judgment, and the subversion of the authority by virtue of which the execution issued, yet, in order to protect the *bona fide* purchasers and grant titles, the sale under such circumstances will be held *valid*.

Again, in the case of *Goodyire v. Price*, Cro. p. 246., the question was moved, whether, (on the reversal of a judgment for error, under which, by writ of *eligiti*, a lease for years of tithes had been delivered to plaintiff, in satisfaction of his debts,) the party should be restored to the lease itself, or the value for which the sheriff had delivered it. The court unanimously determined, that the lease should be restored; for, say they, "there is a difference between the delivery upon an *eligiti* to the party himself, and a sale to a stranger upon a *feri facias*, for the *feri facias* authority to the sheriff to sell; wherefore, when he sells a term to a stranger, although the execution is reversed, yet he shall not, by virtue thereof, be restored to the term, but to the monies, because he becomes duly thereto, by act of sale."

In unison with these authorities was the determination of Judge *Spencer*, in the suit of *Sandford v. Roosa*, 12 Johns. Rep. 162. That a sale of lands even on a junior execution was good, and the court remarked: "the only remedy the *one* whose execution was *first* delivered has, is by action against the sheriff." Notwithstanding, in this instance, the property sold was bound and subject to the elder execution, yet, the sale thereof, under the junior executions was pronounced legal and valid; doubtless on considerations of public policy and expediency. If a sale of real property or lands, under such circumstances, conveys a good title to the purchaser, *a fortiori*, a disposition of personal estate, under like circumstances, will vest an indisputable title in the vendee. In the case under consideration, by the expiration of six months, and due publication made during that period of the apprehension, incarceration, and description of the slave in controversy, as required by the statute, the absolute title to him, analogously to the doctrine of estrays, vested in the county. If this conclusion be undeniable, the plaintiff then, it follows irresistibly, cannot maintain this action, *though the sale were void*. The statute having divested him of the

property, his right of action is gone ; and in such cases the maxim of law is "*portior est conditio defcentis.*"

The statute provides, on the subject of runaway slaves, that an advertisement describing the person, &c., inserted in some public newspaper, for the space of six months, and no owner having claimed, and proved his right thereto, at or before the expiration of six months, it shall be lawful for the sheriff to sell, &c. On an observance of these pre-requisites mentioned, an absolute power accrues to the sheriff to *sell*, and with regard to authority, his situation is the same as if acting under the sanction of a judgment of a court of record : he is equally empowered by the one, as by the other ; and these provisons of the statute, which prescribe the terms of sale to the officer, whether under execution, or a runaway slave, under the statute, are purely directory, as before contended ; and should any of the *minutiæ* be omitted by the sheriff, it will not invalidate the sale, but, if it sell for a less amount, on account of such omission, indemnification may be obtained upon his official responsibility. The principles here contended for, are recognized and established by an authority, or case, in 2 Bibb's Rep. 402. (202.) This case was entirely analogous to the one under consideration. It was an action for the recovery of slaves, &c. In 2 Bay's Rep., is also a case in point. Such are the reasons, and such the authorities upon which the decision below was founded. If a runaway slave be considered in the light of an estray, then the original proprietor loses his title under the six months' advertisement and proclamation ; and he must then rely upon the purchase money, or go upon the officer for damages. And in the second place, if it be lawful for the sheriff to sell on the expiration of six months, the requisitions of the statute, as to the manner of sale, are purely directory, and the vendee, without fraud, is protected in his title against the owner, where remedy is the same as in other cases where the power to sell accrues by operation of law. As to the other consideration ; if this is to be considered a new or vexed question, or, as the English judges sometimes term it, an integral point. I believe the gentlemen of the bar, as well as the court, are unanimous in the opinion, that the judgment ought to be affirmed ; it is, therefore, neither necessary nor expedient to discuss those points again.

6.

LABRANCHE v. WATKINS. June T. 1816. 4 Martin's Louisiana Rep. 391.

Per Cur. Martin, J. The plaintiff complains that the defendant detains his negro slave. The defendant answers, that the slave ran away, and was delivered to him as jailor; that he advertised and detained him during the time prescribed by law, and finally sold him, after having obtained the permission of the parish judge; that he has since bought the vendee's title to the slave, under which he now holds him. The facts, as agreed upon by the counsel of the parties, are these: The slave was brought to jail on the 20th of July, 1813; and on the 16th of August, the defendant wrote to a person in New Orleans to advertise the negro three times, according to practice. There is no other evidence of any compliance with the defendant's directions in this respect, except a newspaper, bearing date of the 3d of September, 1813; and the 29th of August, 1815, the sale took place. There is not any date to the petition of the defendant for the judge's leave, nor to the judge's order thereon. The only fact stated in this petition is, "that the negro had been confined as a runaway two years, completed on the 29th of July, 1815." The compliance with any requisites of the law is not alleged; it is not stated that the negro was not claimed. The slave was sold by the defendant to Henry Wyatt, who immediately afterwards, viz. on the same day, conveyed all his rights therein for the price at which it was sold to him. The plaintiff produced a notarial act of sale, as evidence of his title, which does not appear to have been questioned. On the 20th of September, 1814, he sent his son to claim the negro, with a letter to the parish judge, complaining, that from the defendant's neglect to advertise the negro, as the law requires, he had not till then any knowledge of his confinement. Eighty dollars were offered to the defendant for his charges; but he claimed one hundred and eighty. On the acknowledgement of the defendant's deputy, that the negro had been advertised in one paper only, the parish judge made an order for his delivery, on payment of two months' expenses, and the fees of arrest; but the defendant refused to deliver the negro thereon. It is admitted that the negro was sick; that at the time of the plaintiff's application the doctor's bill amounted to eight dollars, and afterwards rose to forty-one; that he was not confined, worked out, and attended the defendant's deputy as a servant. On these facts, the district court gave judgment, that the

A runaway slave cannot be sold by the sheriff till two years after the date of the advertisement.

plaintiff recover the negro from the defendant, and one hundred and eighty-five dollars and twenty-five cents for his damages ; and the defendant appealed. The 28th section of the first part of the black code provides, that runaway slaves shall be advertised, in at least two newspapers, in French and English, during three months successively, and, after that time, once a month during the remainder of the year. They shall be employed and kept at work for the county, by whom clothing, medicine, attendance, and maintenance shall be found ; but these expenses shall be discharged by the owner, when the negro cannot be usefully employed.

The next section provides, that if the owner do not reclaim the negro within two years from the date of the advertisement in the newspaper, in compliance with the preceding section, he shall be sold by the sheriff, with the permission of the judge, after *three* advertisements, for the payment of the charges, to be fixed by the judge. Now, the case under consideration does not appear, from the petition or order, to be one in which the sale could be ordered. The negro is stated to have been in jail two years ; but the law allows only the sale of slaves who have been *unreclaimed* during two years, not after the arrest, but after the date of the first advertisement. The parish judge can only order the slaves advertised for one year ; the case on paper does not show that the negro was advertised at all. Admitting even that the order justified the sale, (which we clearly think it does not,) the testimony on record shows that no legal sale has taken place. The defendant sold to himself. —Wyatt lent his name. This fact results from the evidence spread on the record. A runaway negro is delivered to the jailor, who neglects advertising him according to law ; the owner, however, hears of the capture of his slave, makes himself known, claims his property, tenders more than is due, yet the slave is withheld. The jailor obtains an order of sale, without any allegation or proof of the case being one in which the law authorises a sale ; he sells the slave after *one* advertisement, while the law requires *three* ; executes a deed of sale to a man, who instantly transfers all his right to the jailor. We are of opinion, that the order of sale was rendered in a case in which the judge who granted it, from the very proceedings, does not appear to have had any authority to exercise. It consequently must be viewed as a nullity. The defendant, from the testimony in the case, made a fraudulent attempt to divest the plaintiff from his title in the slave. The damages allowed to the latter do not appear to us too high. Judgment affirmed, with costs.

7.

PALFREY v. RIVAS. Jan. T. 1820. 7 Martin's Louisiana Rep. 371.

Martin, J. The petition charges, that the defendant having arrested the plaintiff's runaway slave, instead of pursuing the means which the law directs, in order to secure him, kept him at work on his own plantation for fourteen or fifteen days; after which the slave escaped, and has never been heard of since. There was judgment for the defendant, and the plaintiff appealed. From the statement of facts, which consists of the depositions of a number of witnesses, it appears, that the defendant arrested the plaintiff's slave on a Sunday, secured him in strong iron fetters, and informed the plaintiff of the capture, proposing to purchase the slave. He also procured a gentleman of the neighborhood to address the plaintiff on the same subject. Both letters reached the plaintiff, who immediately addressed the gentleman who had written, at the defendant's request, enclosing a small sum to defray the expenses of the capture, and requesting him to inform the defendant that he might have the negro for a price which was then fixed. In the meantime, during the night between the Thursday and Friday following the slave's arrest, he effected his escape. In the letter of the plaintiff to his friend, desiring him to offer the slave for sale to the defendant, he requested that, if the offer was not accepted, the slave might be taken to a blacksmith, put in irons, and kept till an opportunity to send him to New Orleans presented itself; but, if none could be had shortly, that he might be sent to jail. The fetters put on him by the defendant are sworn to have been very strong, and in the opinion of the witnesses such as precluded the idea of his escape. The defendant, it appears, treats thus the negroes whom he arrests, and makes no charge against the owners. The plaintiff relies on the act of 1816, 2 Martin's Digest, 514. n. 6., which provides, that whenever a slave shall be apprehended, he shall be taken before the parish judge, or the next justice of the peace, who shall make inquiry as to his name, and that of his owner, and send him to jail, &c. He contends, that as the defendant did not comply with the requisites of the law, he must be liable for the consequences. On the part of the defendant, it is insisted, that the positive charge in the petition, viz. that the slave was kept at work for the defendant is disproven, and the implied charge of a neglect to comply with the requisites of the act cited, is not presented as a substantial cause of action, which the defendant was

If the taker up of a runaway keeps him four or five days in irons, sends immediate word to the owner, offering to purchase him, and the latter enters into a treaty therefor, and in the mean time the slave escapes, and the jury find for the defendant, the supreme court will not disturb the verdict.

bound to disprove. We are of opinion that the petition charges the neglect of the defendant in a manner sufficiently positive to put him on his defence. The act requires a person who takes up a runaway slave to carry him before a magistrate, but it does not fix any particular time for doing so. The taker up cannot be expected instantly to abandon his own work, and go, accompanied by his own negroes, to the justice. A reasonable time must be allowed for that purpose. And this is a matter of fact. If he has business of his own pressing on him, which does not admit of a delay, he may secure the runaway during a reasonable time. If the owner resides nearer to him than the justice, he may well send him word to come and take his slave away. If the latter escape in the mean while, it is not clear that the taker up is to bear the loss.—*Nemini debet suum officium esse noceosum.* Taking up a runaway slave is generally a kindly office. No private man is bound to undertake it.

It is true, the law provides a compensation, but few persons demand or accept it, and the defendant appears to be one of those. The law of this case is pretty plain; and the jury who passed on it had but two facts to consider: Did the defendant neglect to carry the slave to a magistrate for too long a time? Did not the plaintiff approve of the slave being kept as he was? They have found for the defendant generally; and we are far from seeing that they erred. This is certainly a very hard action, and every allowance must be made in favor of the defendant, who acted with the best intentions, desirous of avoiding any useless expense to the plaintiff, and who treated the slave in the very manner in which plaintiff desired he might be treated, if the defendant did not purchase him. The jury, who knew the situation of the defendant, his distance from the next magistrate, and his ability to spare hands to guard the slave on the way, have said the plaintiff ought not to recover.

The plaintiff, in two letters, before and after he heard of the escape of the slave, does not appear to have disapproved—did not complain of the conduct of the defendant. On the contrary, he used expressions therein, which might be construed into an approbation of his conduct; and if the verdict was grounded on a belief that it was approved and ratified by the plaintiff, we cannot say that the jury erred. Upon the whole, the verdict and judgment appear to us correct.

8.

SKINNER v. FLEET. Aug. T. 1817. 14 John's. Rep. 263.

The court held, that where a slave ran away from his master, who was an inhabitant of the state of Connecticut, and came to New-York, where he was taken and sold by his master to a person in New-York, but whose residence was in Connecticut, and who was temporarily engaged in business in the city of New-York, the sale was valid under the act of 1801. 1 K. & R. 614. ; and the slave was not entitled to his freedom. The case is not within the mischief intended to be guarded against by the statute.

9.

HOGG v. KELLER et al.. Nov. T. 1819. 2 Nott and M'Cord, 113.

Trespass for whipping the plaintiff's negro. Defendants, to justify under the patrol law, that the negro's pass did not state where he was going. Verdict for defendant.

Per Cur. Colcock, J. The law does not require a master to state, in every pass, to what place the negro shall be permitted to go. It is sufficient if it express a leave of absence for such a time ; 2 Brev. 231. The defendants, therefore, were guilty of a trespass on the plaintiff's property, and he is entitled to a verdict. New trial granted.

The pass need not state where the slave is to go ; it is sufficient if it express a leave of absence for a specified time.

(XIX.) OF THE EMANCIPATION OF SLAVES.

(A.) BY DEED.

1.

M'CUTCHEN et al v. MARSHALL et al. January T. 1834.

8 Peter's Rep. 220.

Justice *Thompson*, in speaking of the right of owners to emancipate their slaves, uses these words : " As a general proposition, it would seem a little extraordinary to contend, that the owner of property is not at liberty to renounce his right to it, either absolutely, or in any modified manner he may think proper. As between the owner and his slave, it would require the most explicit prohibition by law to restrain the right. Considerations of policy, with respect to this species of property, may justify legislative regulation, as to the guards and checks under which such manumission

Emancipation of, may be restrained or qualified.

shall take place, especially, so as to provide against the public's becoming chargeable for the maintenance of slaves so manumitted.

2.

FERGUSON et al. v. SARAH. June T. 1830. 4 J. J. Marshall's Rep. 103.

The owner
only may
emanci-
pate.

Enoch Smith, an abolitionist, bought Sarah, the wife of negro Ben, a free man of color, and sold her to Ben, in 1809, for the purpose of being emancipated, and took Ben's notes at long credits in payment. Smith, the vendor, wished Ben to liberate his wife without delay, as he was becoming embarrassed, and he might be eventually unable to do it in consequence of the claims of his creditors. A deed was prepared by Smith in the year 1813, and executed by Ben, in which he emancipated his wife and her children. Ben had not paid Smith the amount of the notes given for Sarah. Smith lived some years after, and always recognized Sarah and her children as free persons.

Ben died intestate in 1818, and Smith in 1825. Ferguson was his executor, and was also appointed administrator of Ben, and took Sarah and her children, and was about selling them for the purpose of satisfying the debt due from Ben to Smith, for the price of Sarah. A bill was filed, alleging these facts, and an injunction awarded restraining the sale. The answer alleges, that the rights of the testator, as creditor, were not impaired by his agency in effecting the emancipation. The circuit court perpetuated the injunction.

Per Cur. Robinson, Ch. J. Ferguson, as administrator of Ben, had no interest in the plaintiffs, nor any right to control them. Pre-existing creditors of Ben, who did not assent to the deed of emancipation, might disregard it so far as their just claims might be affected by it. For the maxim, that a man must be just before he is generous, was applied to the emancipator by the act of assembly of 1798, (2 Dig. 1155.,) whereby the rights of creditors, and all others, except "the heirs or legal representatives" of the emancipator are saved.

But after manumission, the person so liberated is free as against the emancipator, and the world besides; excepting only *bona fide* creditors, or some other person who had a better right to the slave than the person had, who attempted the liberation; and as to such creditor, his right does not nullify the act of emancipation, nor

otherwise affect it, farther than as a lien for the ultimate security of the debt.

The person emancipated is no part of the assets in the hands of the personal representatives of the emancipator. The emancipation being effectual against the emancipator, must be equally so against his heir and personal representatives. And the act of assembly expressly declares, that it shall be equally so against them all.

As administrator of Ben, Ferguson had no right whatever to the custody of the defendants in error, nor had he as executor of Smith.

The act of 1798 would have saved the right of E. Smith, as the creditor of Ben. But it would have saved it, just as the common law and the statutes for the prevention of gifts, grants, or devises in fraud of creditors will protect their rights from the fraud or premature generosity of their creditors. The law will not allow the honest creditor to be defrauded of his just rights by the collusive or voluntary alienation by the debtor of his property. But if the creditor be privy to the alienation, and assent to it, it is not fraudulent, nor inoperative as to him. *Volenti non fit injuria*. In this case the testator was not only privy to the emancipation, but urged and assisted in effecting it. Decree perpetuating the injunction affirmed.

3

TRUDEAU'S EXR. v. ROBINETTE. Jan. T. 1817. 4 Martin's Louisiana Rep. 577.

Per Cur. Martin, J. The plaintiff claims the defendant as a slave; stating her to be a mulatto woman born from a negro woman, the slave of his testator; avers that she pretends to be free, and is about to sail for the island of Cuba. Her answer denies every fact in the petition. Judgment has been given for her in the district court, and the plaintiff has appealed. The case comes upon a statement of facts, and a bill of exceptions. The statement apprises us, that at the trial, before a jury, the plaintiff introduced a bill of sale from his testator to Gardette, and a reconveyance from Gardette: the first, of March 20th, 1809, the other of April 17th, of the same year. The defendant first introduced a letter of the plaintiff's testator of October 11th, 1808, containing the following expressions: "Robinette, a child of my house, having always acted in a manner different from that of girls of her color, I am happy that she finds the opportunity of securing her happiness,

A deed of emancipation of a slave, under the age of 30, is void.

especially at the eve of the day when her young mistress is under the necessity of calling her back near her, or of replacing her." The testator then offers her to Gardette for 1000 dollars.

2. A bill of sale of Robinette from James Mather, styling himself attorney in fact of George Mather and Aurone, the wife of said George, one of the testator's daughters, of July 1810, to A. Abat.

3. Another, from the latter to A. D. Tureau, of the 22d of December, of the same year.

4. One from the latter to the defendant's mother, now, and then, a free negro woman, of Sept. 10, 1811.

5. A deed of emancipation of the defendant, dated July 21, 1812.

6. The record of a suit, instituted by George Mather and wife against Abat, for a part of the price of the defendant. Gardette, a witness introduced by the defendant, deposed, that he had known her for ten years past; that she is the person he bought from the plaintiff's testator; that she always passed as the plaintiff's testator's slave, and he hired her as such; that he believes the testator knew of the sale of the defendant by Mather to Abat, because he was told so by the family, and the bargain was made at the house of one of the testator's daughters.

Lozane, another witness, introduced also by the defendant, deposed, that the defendant had been in the enjoyment of her freedom for some years past; that Gardette, the other witness, lives with and has three or four children by her. The plaintiff proved that he had taken up and confined the defendant, but that she was liberated on a *habeas corpus*.

To the introduction of the deed of emancipation, as evidence, the plaintiff objected, it appearing illegal on its face. The defendant was stated in it to be of the age of *twenty-four*, a fact which was not denied, while the law forbids the emancipation of slaves under that of *thirty*. 1807, 18, sect. 2. A bill of exceptions was taken to the opinion of the court, overruling this objection; and in sealing it, the judge stated his reasons as follows: "I allowed the act of emancipation to go to the jury for what it was worth, although at the time I considered it immaterial to the real issue of the case whether it was legally executed or not. Trudeau was plaintiff; and I charged the jury, that if his testator had parted with his title to the defendant, he had no right to recover; that the validity of the act of emancipation was a question between the

person who made it, or his creditors, and the defendant, and not to be tried in this cause, therefore, not for their consideration.' We think the judge's view of the question, *at the time*, which, out of the hurry of a trial, he would himself have considered erroneous—an incorrect one. If the evidence was immaterial to the issue, why admit it? We are of opinion that the document, had it been a legal one, would have been most material, a *sine qua non* piece of evidence. But we think it was illegal, null, and void; the officer who received it having done so in contempt, if he was not ignorant, of the law. A slave, considered as an object of property, is a *thing*, and as such, not entitled or capable to resist the exercise of ownership on him (as an *actor* in a suit, or on a writ of *habeas corpus*, nor as a defendant) on account of a want of title in the person who claims or uses him as his property. If he bring suit, or be sued on a claim of property on him, the issue can only be *liber vel non*. If he prove his freedom, no title can exist in his opponent, till his freedom be proven; there is no person to stand in judgment with the claimant, who therefore could neither avail himself of, nor be concluded by, the judgment. Civil Code, art. 19.; Black Code, 1816, 33. Sect. 16. Here the defendant clearly appears to have been a *slave*, and there is no evidence of *emancipation*. If the plaintiff has parted with his title to a known person, who is unwilling to incur the risk and expense of a trial, and does not insist on his right, the slave has no capacity to resist. If the owner be unknown, it is as if he did not exist. If he be known, and absent, the court below might have appointed a person to interfere in his behalf. Owners ought not to be subjected to support or exhibit their titles, contradictorily with their slaves. Whenever the issue *liber vel non* is found in their favor, the court must give judgment for them, without any inquiry into the title. As this inquiry would not avail them against other claimants, it would be wrong to prejudge, by trying the claim, the rights of others.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed, and that the plaintiff do recover the defendant Robinette, and that she return to him as his slave.

4.

SAWNEY V. CARTER. March T. 1828. 6 Rand's Rep. 173.

And the deed must be recorded in the proper court.

Per Coultter, J. It has been decided by this court, that a deed of emancipation, not recorded in the proper court, but in some other, gives no title to freedom until properly recorded. *Givens v. Mann*, 6 Munf. Rep. 191.; *Lewis v. Fullerton*, 1 Rand's Rep. 15. The same principle was decided in *Donaldson v. Jade*, Bibb's Rep. 57. But the law is now changed in Kentucky by the act of 1800. 2 Litt. 387.

5.

WINNEY V. CARTWRIGHT. Spring T. 1821. 3 Marshall's Rep. 493.

But a different rule prevails in Kentucky.

Trespass, assault and battery. The question turned upon the issue of freedom or slavery of the appellant. It appeared a Mrs. Reed had owned him, and had executed a deed of manumission, and acknowledged it to be her act and deed before two persons. The court rejected this evidence.

Per Cur. *Mills, J.* By the act of 1800, 2 Litt. Rep. 387., it is enacted, "that every person of the age of 18 years, being possessed of, or having a right to, any slave or slaves, may, by his or her last will and testament, or by an instrument of writing, emancipate such slave or slaves." By the express words of this act the power is granted to emancipate, by a will, or instrument of writing, so that, whenever the instrument of writing is made by that person, the emancipation is complete. The seal is dispensed with. If the act of emancipation goes so far as the completion of what may be termed an instrument of writing, that is, a writing declaring its object, and signed by the party, the appendage of a seal is not necessary. The proof of the acknowledgment is dispensed with, so far as it constitutes an essential ingredient in the manumission. Since the passage of the act, we conceive that a writing emancipating a slave is placed on the footing of a will after the death of the testator, or a deed before its enrolment, and after the execution and delivery. It is valid, and passes the estate.

6.

JULIEN V. LANGLISH. Jan. T. 1821. 9 Martin's Louisiana Rep. 205.

Per Cur. Martin, J. The petition states, that *Peter Langlish*, now deceased, being in his lifetime the owner of the plaintiff, a black man, emancipated him on the 24th of October, 1814, by a notarial act, after having fulfilled all the formalities which the law requires. The act has a suspensive clause, by which a condition is annexed to the emancipation of the plaintiff, who was thereby bound to continue to serve the said Peter, as before, till his, the said Peter's death, when the plaintiff was fully, and without further restriction, to enjoy his freedom. The plaintiff alleges, that in order to comply with this condition, he ever since, gratefully and exactly as before, served the said Peter, and regularly paid him twenty dollars per month, in conformity with an agreement on that subject made between them, and rendered him other services, when requested, till the 23d of April, 1818. In the course of which year the said Peter instituted a suit against him, and one B. Schons, in the parish court, to have the aforesaid deed of emancipation annulled; in which suit, the said Peter finally failed. 5 Martin's Rep. 405. The judgment of the supreme court thereon pronounced, on the 23d of March, 1818, had scarcely become final, when, on the 8th day of the following month, the said Peter executed what is called a deed of revocation of this deed of emancipation, before a notary, and on the 23d, the plaintiff was, through the agency of several ill-disposed persons, who availing themselves of the old age and infirmities of the said Peter, had prevailed on him to execute the deed of revocation, arrested, and deprived of every article of property, even of his clothes, dragged to jail and inhumanly whipt: whereupon, in order to prevent the recurrence of such abuse, he resorted to the authority of the law, and instituted a suit against the said Peter, which he was afterwards advised to, and did discontinue. The petition further charges, that the said Peter, on the 9th of December following, instituted the present defendant his heir; and he now, the said Peter having since died, wrongfully claims and detains the plaintiff as a part of the testator's estate. The answer states, that the plaintiff is, and has been a slave, and is the property of the defendant; that the pretended deed of emancipation is null and void; that, admitting its legality, it cannot avail the defendant, being a *donatio mortis causa*, and having been

If freedom be given to a slave, under the express condition that he serve his master as before, till his death, and he afterwards refuse, and attempt to compel him to accept monthly compensation for his services, he cannot obtain his freedom after the master's death.

revoked. The general issue is pleaded. The district court gave judgment for the plaintiff, being of opinion that "the act of emancipation was executed in due form of law, and the plaintiff acquired by it an absolute and indefeasible right to his freedom, as the person therein mentioned; and between the execution of the act and the death of said Peter, the latter had the same rule and authority over the plaintiff as he had before; but the right of freedom, having once been acquired, could not afterwards be altered or forfeited by any act of the plaintiff, or his master, because it is unalienable." The defendant appealed. The documents which come up with the record, are the acts of emancipation and revocation; the proceeding in the suit brought by Peter Langlish, to have the first act annulled, and in the suit brought against him by the present plaintiff, referred to in the petition.

The deed of emancipation purports, that Peter Langlish, "by these presents, gives freedom to his negro slave, named Julien, 46 years of age, gratuitously, and to remunerate him for his fidelity and former services, and those he is to render him until his death; which freedom is given under the express condition, that he shall serve his present master as before till he die; after whose death he is to enjoy it fully, without any opposition or contradiction from any person whatever. Wherefore, *au moyen de quoi*, he divests himself, and parts with all his right of property and actions on the said slave *Julien*, in order that he may deal, contract, sell, purchase, make a will, and enjoy all the privileges of a freeman, after the grantor's death."

Boisgobert deposed, that Peter Langlish told him, the plaintiff should never serve any other master after his death; that the plaintiff always conducted himself well, and never ran away. It is in the deponent's knowledge, that the plaintiff continued to serve his master faithfully, until he was put in prison.

About ten years ago P. Langlish told this deponent, that the plaintiff worked in town, and paid him eighteen dollars per month. The deponent then lived on the Bayou, and now lives on the Bayou road. P. Langlish lived at the Metairie, about a league and a half from town. The deponent has since been frequently in the neighborhood, and seen the plaintiff coming out of his master's plantation with vegetables. A number of other witnesses testified to the same fact. The jailor deposed, that the plaintiff was brought to the jail on the 23d of April, 1818, and whipt. This was done, and he was detained on the verbal order of the defendant, by one

Valcour, who conducted the plaintiff to the jail. The latter remained there till released by an order of court, on the 23d of May following.

Dutillet saw the plaintiff when he was going to jail, and asked him what was the matter. He replied, that his master, who was an old rogue, sent him to jail, and wanted to deprive him of his liberty. Another witness deposed to the same fact. Beaulieu deposed, that he knew P. Langlish for twenty-two years; that he enjoyed his mental faculties till his death.

The deed of revocation bears date of the 18th of April, 1818. P. Langlish therein declares, in general terms, that he has "just and valid motives to change his dispositions," and revokes and annuls the act of emancipation.

We are of opinion, that the plaintiff has not proved that he fulfilled the condition on which he was to be free at his master's death, and it is in proof that he did not. He refused to serve him as a slave, and was desirous of compelling him to accept, in lieu of his services, a monthly compensation of eighteen dollars. He brought a suit for this purpose, which he afterwards discontinued. The testimony of Dutillet, and the witness who followed him, show that he insisted on enjoying his freedom before the death of his master, since he charged him with being an old rogue, who was seeking to deprive him of his freedom. It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed, and that there be judgment for the defendant.

7.

FISHER'S NEGROES v. DABBS and others. March T. 1834.
6 Yerger's Tennessee Rep. 119.

On the 31st of July, 1827, Peter Fisher made and published his last will and testament, and therein, among other things, provided and directed as follows, to wit: "I give my negroes, all of them, their freedom, and a right to live on my tract of land fifteen years; also, there is to be laid out of my present crop, one year's support; there is to be laid off a sufficient quantity of horses, cows, hogs and farming utensils for them to make a support; to be divided by persons appointed by the court. If any of my negroes withdraw from the land, he has no right any farther to do any thing with the land; but his share falls to the rest, until the time allowed them on the land expires; then all my property, not disposed of,

A deed or will emancipating slaves is not valid by the laws of this state; but the right communicated to the slave is imperfect until the state assents to the contract or devise. If

the state assents to the bequest of freedom, the right becomes perfect; and whether this assent was made before or after the will or contract was made, makes no difference.

after paying my debts, is to be equally divided between my brother's and sister's children." Shortly after the publication of this will, the testator died, and probate was had of it in the county court of Sumner. The persons appointed executors declining to act, Jeremiah Fisher, one of the devisees of the *residuum*, was appointed administrator with the will annexed, and presented to said court a petition for the emancipation of said slaves. But the petition not containing the allegations required by law, or at least required by the court, he declined proceeding any farther in the matter. He subsequently withdrew from the administration, filed a petition praying for an issue, and procured an issue of *devastavit vel non* to be made; and after several trials, the issue was determined in favor of the will, in the circuit court of Sumner, so far as related to the personal property disposed of by it; and James Dabbs was duly appointed administrator with the will annexed. James Dabbs, it is alleged, though urged by the negroes, and those interested in their behalf, to file a petition in the county court of Sumner, for the purpose of procuring their emancipation, refused to do so, upon the ground that he was unwilling to sign the bonds required by law. In 1829, an act was passed by the legislature of Tennessee, entitled "An act more effectually to provide for emancipation of slaves." This act provides, "That where any person shall, by his last will and testament, have directed any slave or slaves to be set free, it shall be the duty of the executors, or administrators with the will annexed, to petition the county court, accordingly; and if the executor or administrator shall fail or refuse to do so, it shall be lawful for such slave or slaves to file a bill in equity by their next friend; and upon its being made satisfactory to appear to the court, that said slave or slaves ought of right to be set free, it shall be so ordered by the court; who shall thereupon require bond, with good security, to indemnify the county court under the existing laws upon that subject. And the chancellor, upon the filing of any such bill, shall make such interlocutory orders as may be deemed necessary to secure the rights of the respective parties." After the passage of the act of 1829, the bill of Levy, Handy, and others, by their next friend, Andrew Hays, was filed. The bill states the foregoing facts, and prays that the complainants may be emancipated and declared free, and for an account of what they may be entitled to under the will. Jeremiah Fisher, one of the legatees of Peter Fisher, applied to the court to be made a defendant to this bill, which motion was

refused. He thereupon filed an original bill, in the nature of a cross bill, alleging that he had purchased from the other legatees of Peter Fisher, all their interest under the will ; which fact was proved. He also alleged, that the act of 1829 was unconstitutional and void ; that the chancellor had no jurisdiction to decree or act upon the matters stated in the original bill of complainants, Levey and others. Alleged, also, that if the act were constitutional, and the chancery court had jurisdiction, that the relief prayed ought not to be granted, because the slaves had not rendered such meritorious services as would entitle them, under the laws of Tennessee, to be set free. That they were slaves of bad character, unworthy to be tolerated as free, and that in fact they would be a nuisance to the neighborhood if they were free ; and that it was inconsistent with the policy of the state to emancipate them, &c. ; and charges, that Dabbs refused to file the petition merely to give the chancery court jurisdiction.

This bill, upon motion, was consolidated with the bill filed by the slaves. Hays and Dabbs answered the cross bill, denying most of the allegations in it, to which replications were filed. Thus stood the cause when, in 1831, the legislature passed the following act, entitled " an act to explain and amend an act passed Dec. T. 1829, ch. 29., more effectually to provide for the emancipation of slaves : " " Be it enacted by the general assembly of the state of Tennessee, That the above recited act shall in no wise be so construed as to extend to any case where any person may, by their last will and testament, have directed any slave or slaves to be set free before the passage of the above recited act, which this is intended to amend ; but in all such cases where any suit shall have been instituted in the district chancery court, under the provisions of the act which this is intended to amend, it shall be the duty of the chancellor, at the first term of said court after the passage of this act, to have the same stricken from the docket ; and it is hereby made the duty of the clerk of said court to transmit to the clerk of the county court where the parties reside, the whole of the records and proceedings in said cause, which shall stand for trial at the first term of the county court thereafter, under the same rules, regulations, and restrictions, as if the said suit had been originally instituted in said county court ; provided, however, that the costs which shall or may have accrued, shall abide the final issue of the suit."

After the passage of this act, to wit, at the — term of the chancery court at Carthage, the counsel for Fisher moved the court to strike the cause from the docket, pursuant to its provisions. This the chancellor, Reese, refused to do, for the reasons set forth in his opinion hereinafter referred to. The causes were afterwards tried by Chancellor Cook, who refused to emancipate any of the slaves, except one. The bill was therefore dismissed, as to the residue. From which decree an appeal was prayed, and granted, to this court. Upon the hearing of the cause below, it was proposed by the complainants in the original bill, through their counsel, that they were willing to accept their freedom upon any terms the court thought proper to impose. That they would leave the state and go to Liberia. This proposition was renewed in the supreme court. The view taken by the supreme court of the right of the complainants wholly supercedes the necessity of stating the evidence in relation to the character of the slaves.

Per Cur. Catron, Ch. J. Peter Fisher made his will in 1827. He had several slaves who he had devised should be free; that they should have a right to reside upon his plantation for fifteen years; have laid off to them horses, cattle, and farming utensils, to make the support with, and a year's support from the then crop, and ten dollars in money. The balance of his property was devised to his brother's and sister's children as residuary legatees.

The testator died, and the will was duly proved and recorded. The executors therein named did not qualify, and James Dabbs was appointed administrator with the will annexed. He refused to petition the county court to have the slaves emancipated pursuant to the will, because he would not involve himself by giving bond and security that they would not be a county charge. Thus the matter stood, until the act of 1829, ch. 29., was passed, authorizing the slaves to apply to the chancery court by their next friend by bill, and giving that court jurisdiction to decree emancipation. The bill was filed, and proceeded in, to a decree and appeal.

It is insisted the act of 1829 is retrospective and void as against the distributees and residuary legatees of Peter Fisher. That they by his death took a vested right in the slaves, and to the property devised to them after their emancipation, which vested right the act of 1829 gives the chancellor no power to divest; and that the legislature having no such power, could, of course, confer none on the chancellor. If the premises be true, the conclusion is. Had

the legislature the power in 1829 to declare these slaves free persons by the act of assembly? As between Peter Fisher and his slaves, his will, on his death, was a deed of emancipation. Legislation in restraint of manumission aside, and they owed no personal services to the representatives of Peter Fisher; were as free agents as themselves, and as capable of enjoying every natural right. Being in the enjoyment of natural liberty, of course, they had a right to the enjoyment of the property devised to them by their late master. The idea that a will emancipating slaves, or deed of manumission, is void in this state, is ill founded. It is binding on the representatives of the devisor in the one case, and the grantor in the other, and communicates a right to the slave; but it is an imperfect right, until the state, the community of which such emancipated person is to become a member, assents to the contract between the master and the slave. It is adopting into the body politic a new member, a vastly important measure in every community, and especially in ours, where the majority of freemen over twenty-one years of age, govern the balance of the people, together with themselves; where the free negro's vote at the polls, is of as high value as that of any man. Degraded by their color and condition in life, the free negroes are a very dangerous and most objectionable population where slaves are numerous. Therefore, no slave can be safely freed but with the assent of the government where the manumission takes place. But this is a mere matter of public policy, with which the master or the slave cannot concern. It is an act of sovereignty, just as much as naturalizing the foreign subject. The highest act of sovereignty a government can perform, is to adopt a new member, with all the privileges and duties of citizenship. To permit an individual to do this at pleasure, would be wholly inadmissible. How or when the state assents to the contract of manumission, whether before or after its execution, is beside the contract, has nothing to do with its obligation on the master or the slave, and is unrestricted by the constitution. Was there a general law authorizing all free persons to emancipate their slaves at pleasure, then the assent of the government would be given in advance of the act of the master. Such was the law in effect and practice before the passage of the act of 1777, ch. 6., to prevent domestic insurrections, and for other purposes. The act declared no slave should thereafter be set free, except for meritorious services, to be adjudged of and allowed by the county court, and license first had and obtained thereupon, &c.

The county court had conferred upon it the sovereign power to give the assent of the government to the manumission, but was restricted in giving assent to especial cases, where the slave had performed some extraordinary service. This, of course, extended to the great mass of slaves, and particularly to children, who could not have performed any such service. To free the mother, and retain as slaves the children, often violated humanity ; as did the giving freedom to the husband or wife, and retaining the other in slavery. To obviate these, and such like hardships, the act of 1801, ch. 27., was passed. By this act, the county court is given as plenary power as the legislature itself possessed, to emancipate slaves on petition of the owner—nine, or a majority of the justices being present, and two thirds concurring. The court is to examine the reasons set forth by the petition, and if it be of opinion, that acceding to the same would be consistent with the interest and policy of the state, the chairman shall report the petition as granted, and sign the same ; which shall be filed of record. The same power and discretion is, by the act of 1829, ch. 29., conferred on the chancellor. It is argued, the chancellor has no discretion, by the act of 1829, in cases coming within its provisions. We think it did not intend that his powers and those of the county court should differ, as either might be applied to, to execute the law.

The chancellor was not on this branch of the proceeding before him, trying a cause between the slaves of the estate of Peter Fisher and his representatives, but he was acting as the authorized deputy of the state of Tennessee ; and in this capacity it lay upon him to adjudge, whether it was consistent with the interest and policy of the state, that the slaves who had devised to them their freedom by Peter Fisher, should be manumitted in confirmation of the will.

He determined that Washington, one of the slaves should be freed, and that the others should not be. This was a sentence from which an appeal lay to this court. The discretion to be exercised, was a legal discretion, requiring the chancellor to adjudge. On the appeal, it is made our duty to give such judgment or sentence, as the court below ought to have given. It rests upon us to determine what is the policy most for the interest of the community generally, and of Sumner county in particular, in this matter. That policy can best be ascertained from the act of 1831, ch. 52. The state has there spoken, and might by that act have given her assent to the bequest in Peter Fisher's will, as she has in other similar cases, had she seen fit ; and she might in future give her assent in this case, were this court to refuse as was in

effect done in the instance of David Beatty's slaves, as will be seen in the cause of *Hope v. Johnson*, 2 Yerger's Rep. 123.

The policy of the act of 1831 is, not to permit a free negro to come into the state from abroad; and secondly, not to permit a slave freed by our laws, to be manumitted upon any other condition than that of being forthwith transported from the state, to which, by the first section, he dare not return. We hold this law to have been every way binding on the chancellor's discretion, and that it is so in ours. We think it is clearly inconsistent with the policy of the state, and the interest of its citizens, to give the assent of the government to the manumission of these slaves, upon any terms short of their immediate removal beyond, not only our jurisdiction, but beyond the limits of the United States of America. The injustice of forcing our freed negroes on our sister states, without their consent, when we are wholly unwilling to be afflicted with them ourselves, is so plain and direct a violation of moral duty, as to inhibit this court from taking such a step. To treat our neighbors unjustly and cruelly, and thereby make them our enemies, is bad policy, and contrary to our interest.

Would it not be treating the non-slaveholding states unjustly, to force our freed negroes upon them without their consent? and would it not be treating the slave-holding states cruelly? We are ejecting this description of population, fearing it will excite rebellion among the slaves; or that the slaves will be rendered immoral to a degree of depravity inconsistent with the safety and interest of the white population. These are fearful evils. But are they not more threatening to Virginia, (just recovering from the fright of a negro rebellion,) to the Carolinas, to Georgia, Alabama, Mississippi, and Louisiana, than to us? Compared with the whites, most of them have two slaves to our one; some of them almost ten to our one. Even Kentucky has a higher proportion than Tennessee. How can we then, as honest men, thrust our freed negroes on our neighbors of the South? Suppose the non-slaveholding states north west of the Ohio were willing to receive our freed negroes, (a supposition by the way wholly untrue,) would it be good policy in us to locate them on our borders, beside our great rivers, forming wretched free negro colonies, in constant intercourse with our slaves? They must live in neighborhoods separated from the whites. Their condition has, and will preclude intermarriages and close association. That such a population inhabiting a country near us, should become a most dangerous receptacle to our runaway slaves, and a grievous

affliction to the state where situated, as well as to ourselves, need only be stated to gain universal admission. The time would soon come when the attempt to seize on the harbored slaves would produce war with such a people, and serious collisions with the state within whose jurisdiction they resided. This it is our own interest to avoid. All the slaveholding states, it is believed, as well as many of the non-slaveholding, like ourselves, have adopted the policy of exclusion. The consequence is, the freed negro cannot find a home that promises even safety, in the United States, and assuredly none that promises comfort. We order the present petitioners for freedom to be emancipated on the terms, that they be sent beyond the limits of the United States, for additional reasons. The act of 1833, ch. 64., to aid the colonization society, provides, that the treasurer of Middle Tennessee pay to the treasurer of the society for its use, ten dollars for each free black person that the treasurer of the society shall certify has been removed from the state of Tennessee to the coast of Africa.

The foregoing society has formed a colony of free blacks at Liberia, on the coast of Africa. The people residing there are all from the United States, speak our language, pursue our habits, profess the christian religion, are sober, industrious, moral, and contented; are enjoying a life of comfort and of equality, which it is impossible in this country to enjoy, where the black man is degraded by his color, and sinks into vice and worthlessness, from the want of motive to virtuous and elevated conduct.

The black man in these states may have the power of volition. He may go and come when it pleaseth him, without a domestic master to control the actions of his person; but to be politically free, to be the peer and equal of the white man, to enjoy the offices, trusts, and privileges our institutions confer on the white man, is hopeless now and forever. The slave, who receives the protection and care of a tolerable master, holds a condition here superior to the negro who is freed from domestic slavery. He is a reproach and a by-word with the slave himself, who taunts his fellow slave by telling him, "he is as worthless as a free negro!" The consequence is inevitable. The free black man lives amongst us without motive and without hope. He seeks no avocation, is surrounded with necessities, is sunk in degradation—crime can sink him no deeper, and he commits it of course. This is not only true of the free negro residing in the slaveholding states of this union: in the non-slaveholding states the people are less ac-

customed to the squalid and disgusting wretchedness of the negro ; have less sympathy for him, earn their means of subsistence with their own hands, and are more economical in parting with them, than him for whom the slave labors, of which he is entitled to share the proceeds, and of which the free negro is generally the participant, and but too often in the character of the receiver of stolen goods. Nothing can be more untrue than that the free negro is more respectable as a member of society in the non-slaveholding, than the slaveholding states. In each, he is a degraded outcast, and his fancied freedom a delusion. With us, the slave ranks him in character and comfort ; nor is there a fair motive to absolve him from the duties incident to domestic slavery, if he is to continue amongst us. Generally, and almost universally, society suffers ; and the negro suffers by manumission.

These are some of the reasons why we give the assent of the state to the emancipation of these slaves, in accordance to Peter Fisher's will, upon the condition, and condition only, that they be transported to the coast of Africa. To the course pursued in this instance, there might be exceptions in other cases ; but they should be most rare, and grounded on reasons the most prominent and conclusive. This application furnishes none such. Bond and security will be given, partly in accordance with the second section of the act of 1831, ch. 102., conditioned, that the freed persons shall be transported to the colony of Liberia, on the coast of Africa, and which shall form part of the judgment of this court. The act of 1831, ch. 101., in effect directed the chancery court to dismiss this cause. Chancellor Reese, in a very lucid opinion, treated the act, and justly, as an unauthorized mandate, unconstitutional and void. This court adopts that opinion, which is herewith filed. Decree affirmed.

The following is the opinion of Chancellor *Reese*, referred to and adopted in the foregoing opinion.

The act of 1829, ch. 29., contains two important features : First, it declares it to be the duty of the executor, when there is a bequest of liberty to a slave, to endeavor to procure his emancipation. This had before that time been ruled to be his duty by the supreme court of the state, in the cases of *M'Cutchen v. Price and Wife*, 3 Haywood's Rep. 211., and *Ann Hope v. Johnson*, 2 Yerger's Rep. 123. And, in the second place, that if the executor fail to perform this duty, the slave, by his next friend, may file his bill, and have his rights or claim to liberty under the will inquired into

and determined. These decisions, and this act of assembly prove, that the rigor of former opinions on the subject of slavery had, whether properly or otherwise, not a little relented. The act recognizes the bequest of freedom as a valuable right to the slave himself, to be prosecuted by him, under some circumstances, in the courts of the country. After the passage of this act of assembly, the slaves in question, by Andrew Hays, Esq. of Davidson, filed their bill in this court, the administration with the will annexed, continued to refuse any application on his part in their behalf to the county court of Sumner; and in their bill they make James Dabbs, the said administrator, a party defendant, and allege the material facts herein before stated; pray, that they may be emancipated; and also pray, that an account may be taken of the personal property bequeathed to them by the will, and of their hire since the death of the testator.

Dabbs filed his answer; admits his refusal to petition the county court of Sumner on behalf of complainants; expresses his willingness, and even anxiety, that the will of the testator on the matter should be carried into effect, and exhibits an account of the hire of the negroes. Jeremiah Fisher, who claims to have purchased the interest of the other devisees of Peter Fisher, thereupon filed his cross bill, making Hays and Dabbs party defendants, and alleging collusion between them; and charging, that the refusal of Dabbs to apply to the county court of Sumner, on behalf of the complainants was with a view to give this court jurisdiction; and also praying an account against Dabbs as administrator. Hays and Dabbs severally answer, and deny the above allegations.

On the application of Fisher at the July term of this court, this cross bill was consolidated with the other case. By a previous order of this court, pursuant to the provisions of the act of 1829, ch. 29., the complainants were put into the custody of the clerk and master of this court; an account was ordered between the parties, and a report made, which has been confirmed. Replications were filled, and the cause in a state for hearing at the present term of this court.

Under these circumstances, the following act of assembly, passed November 28th, 1831, is produced to the court, entitled, "An act to explain and amend an act passed Dec. 7th, 1829, ch. 29., more effectually to provide for the emancipation of slaves." This act provides that "the above recited act shall in no wise be so

construed as to extend to any case where any person may, by their last will and testament, have directed any slave or slaves to be set free, before the passage of the above-recited act, which this is intended to amend ; but in all such cases, where any suit shall have been instituted in the district chancery court, under the provisions of the act which this is intended to amend, it shall be the duty of the chancellor, at the first term of the court after the passage of this act, to have the same stricken from the docket ; and it is hereby made the duty of the clerk of said court, to transmit to the clerk of the county court where the parties reside, the whole of the record and proceedings in said cause, which shall stand for trial at the first term of the county court thereafter, under the same rules regulations, and restrictions, as if the said suit had been originally instituted in said county court : provided, however, that the costs which shall or may have accrued, shall abide the final issue of the suit."

Upon this act of assembly, the court has been moved by the solicitor of Fisher, that this cause, pursuant to its mandates, be stricken from the docket. And the question is, shall this be done ? Is the respect and deference for the legislative will, when distinctly expressed, which is justly due from this court, and fully acknowledged by it, to be countervailed, in the present instance, by that paramount obligation which is exacted by the fundamental law ? It is a proposition not to be controverted, that not courtesy only, but duty requires of courts of justice, in expounding legislative enactments, with reference to their conformity to the constitution, to give them such examination as will reconcile them together, and not bring them into conflict, and to be clearly satisfied that a law is unconstitutional, before they so pronounce it. There is this difference, it occurs to me, between the situation of a legislator and a judge : the former should yield his support to no measure unless fully convinced of its conformity to the constitution ; the latter should give effect to all the statute laws of the state, when he no more than doubts the legislative competency to have passed them. But the duty of a judge is obvious and acknowledged, to pronounce an act of the legislature unconstitutional when he believes it to be so ; and it is the peculiar province of the judicial department to expound laws and pronounce upon their conformity with the constitutional will of the people. The question recurs, shall the court strike the cause in question from the

docket ? The legislature has said it shall, and at the present term. I entertain no doubt that the act in question was passed with the purest motives, and upon the fullest conviction, perhaps, of its propriety and justice. It is pretty evident, however, that the legislature was not only uninformed, but probably misinformed of the situation and matter of this case ; of this bill and cross bill, and of the relation in which the parties stand to each other, and the previously existing laws ; for the clerk of this court is ordered to transmit the whole record and proceedings in the cause to the country court, and the county court are ordered to try the cause so transmitted, under the same rules, regulations, and restrictions, which would have governed them if the cause had been instituted there. The only cause which could have been instituted there by law, would have been a petition by Dabbs, administrator, as plaintiff, in behalf of the complainant's freedom.

But this petition Dabbs has not filed, and would not file ; and because of his refusal, he is a defendant to this bill. But I waive this consideration, as, also, the further consideration, that in striking this cause from the docket, I should strike off matter properly cognizable in this court, without reference to the act of 1829, and meet the question fairly upon the main point. The act of 1831 contains three propositions worthy of consideration. That the act of 1829, ch. 29., ought, in no wise, to be so construed as to extend to cases where a will directed slaves to be set free before the passage of the act ; that, therefore, the court should strike such causes from the docket, and that the clerk transmit the record to the county court. If the first proposition were correct, that is, that the proper construction of the act of 1829, does not confer upon this court jurisdiction over a cause circumstanced like the present, the substance of the legislative mandate would follow, and the cause would, if not literally stricken from the docket, be dismissed ; indeed, if such has been the opinion of my predecessor and the other chancellor, the orders which have been made in the cause would not have existed.

It is for the legislature to pass the law, and for the court to expound it. They did pass the law of 1829, and the court here present is of opinion, that a proper construction of that act, as applied to the facts of this case, gives to the court cognizance of the cause. They took cognizance accordingly, and now we are informed by the act of 1831, that the former act ought to be so construed, and

should be construed as in no wise to apply to a case like this. I need not argue to show how little authoritative a conclusion, a legislative exposition of a former act, should be considered. The counsel for the motion are understood to concede that legislative expositions are not to be relied on, and that the exposition in question is not well founded. Here, then, is a case where a right deemed valuable, and a proper subject for litigation, the right to freedom under a will is brought into this court in pursuance of the law, and the matter proper for the investigation of this court is pending. The facts and circumstances which fix the rights of the parties, and give the jurisdiction of the court, are past, or already exist, when a simple legislative mandate comes to us and says, such a case shall not be tried—shall be stricken from the docket. This is the whole of the matter; for if the legislative exposition of the act of 1829 goes for nothing, there is nothing left but the simple, naked, direct mandate of the legislature to strike the cause from the docket; for the balance of the law is a mere direction to the clerk. Shall this court—can this court obey the mandate? If it may in this cause, it may in any—it may in all. Shall the rights of all the parties in this cause to that relief, and to that remedy, by due course of law, which their case calls for, be disregarded, and this court be closed against them? For the efficacy of the act of 1831, and the duty of this court with regard to it, cannot depend upon the fact that a motion has been made to give it effect. If that motion could succeed, the duty of the court would have been the same if all the parties had been not only willing, but anxious to proceed in this court. The declaration of rights, sec. 17., provides, that all courts shall be open, and “every man, for an injury done him in his lands, goods, fame, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay.” This declaration, copied from the great charter, is not a collection of unmeaning epithets.

In England, the reason of riveting this barrier around the rights of the subject, was well understood. Their sovereign was wont to interfere in the administration of justice; “a remedy by due course of law” was often refused under the mandate of men in power, and the injured man denied justice; they were ordered sometimes not to proceed with particular causes, and justice was delayed; and the obtainment of their rights was often burdened with improper conditions and sacrifices, and justice was sold. So anxious were they to stop this enormous evil, that a part of the

official oath of a judge was, that he would proceed to do right and justice, notwithstanding any letter or order to him to the contrary. This clause of *magna charta*—why is it inserted in our bill of rights? Was it from apprehensions of our executive? We had left him no power. Whatever power is considered as properly belonging to the executive department elsewhere, is by our institutions, conferred upon the legislature. It is the more important, therefore, and so the framers of our constitution decreed, that the judicial department should be independent and co-ordinate, and that the legislature should have no judicial power. Danger might justly be apprehended from this quarter. “The judicial power (the whole of it) shall be vested in such superior and inferior courts of law and equity,” &c. If the legislature, possessing a large share of executive power, be permitted to exercise judicial power also, or control the action of the judges within their peculiar sphere, the liberty of the citizens, under the government of good legislators, would be in imminent peril, and under bad ones would be entirely destroyed. The duties and powers growing out of the relation between the legislature and the judicial department, and the lines of demarcation between them, have been the subject of earnest and elaborate discussion in the courts of the several states, and particularly those of the United States; and in the cases of *Dartmouth College*, of *Fletcher and Peck*, and of *Green and Biddle*, and of many others which need not be referred to, the principles applicable to questions of this sort are well settled, and the only difficulty is to apply them to the facts of particular cases. A distinction between the right and the remedy is made, and exists. But where the remedy has attached itself to the right, and is being prosecuted by “due course of law,” to separate between them, and take away the remedy, is to do violence to the right, and within the reason of that provision of our constitution which prohibits retrospective, or, in other words, retroactive laws from being passed, or laws impairing the obligation of contracts.

By the act of 1829, all slaves in whose favor there is a devise of liberty, and where the representative of the testator refuses to apply to the county court, they may file a bill by their next friend in this court; the act of 1831 attempts to take away this right from a portion of them, and from that portion of them where the right and remedy had attached by the actual pendency of a suit, in a “due course of law.” Is not this partial and unequal legislation? It is believed it is. It would give me much more pleasure, if duty

would permit, to conform to the will of the legislature. This feeling is inspired not only by respect and courtesy, but, perhaps also, by a lively sense of the feeble and unsustained character of judicial power, which rests only upon the moral feelings—upon the reason of the community. An improper yielding to legislative enactments, is a danger more to be apprehended from the judicial department, than rash or uncalled for opposition. The history of every age and of every country, has, in every page of it, shown this to be the case.

The independence of the judiciary ought to be anxiously preserved unimpaired; not on account of the individuals who may happen to be judges; they are nothing; but on account of the security of life, liberty, and property, to the citizen. I feel satisfied, that I have no sympathies which would have misled me in this matter; for when permitted to indulge my feelings and opinions as an individual, I find them in strong and direct hostility to all schemes for emancipating slaves under existing circumstances, in the bosom of our community.

Let the complainant in the cross bill take nothing by his motion.

After the above opinion was pronounced the counsel for Fisher moved the court to set aside the decree, and to re-hear the cause, and set forth his reasons in a petition to re-hear.

Catron, Ch. J. The motion to set aside the decree in the case of Fisher's negroes, was brought before the court on yesterday, the last business day of the term. My mind was too depressed with recent over-exertion, to take that strong view of the subject, its intricacy and importance demanded; and I now feel myself wanting in vigor. However, there is no time left. The acts of 1829, ch. 29., and 1831, ch. 101., received little consideration by this court when the opinion on the merits of the cause was drawn up. The court was satisfied with, and adopted the opinion of the chancellor. Upon the high intelligence and ability of that gentleman, we felt safe in resting. Our own opinion is, however, now anxiously desired, on the construction of the act of 1831, and the party dissatisfied is entitled to it.

By the common law, the owner of a slave might manumit him at pleasure. The acts of 1777 and 1801 prohibited this, unless the government assented to the contract of manumission. To give this assent, the county courts were vested with authority. A deed or will of manumission is not void, but binds the owner or representative of the testator, as between him and the slave; it

confers a moral right to freedom upon the slave. Before the act of 1829, the master, or his representative, the executor, was to do the first act: petition the court for the government's assent. The slave had no power to cause his right to be enforced by the courts of justice. He had to deal with sovereignty; he could not sue the state, and compel her to execute the contract with his master. It lay with her to direct the manner in which the remedy should be enforced. Bill of Rights, sec. 17. This is a prerogative of sovereignty, and is independent of the constitution. Then came the act of 1829, for more effectually emancipating slaves. It provides, that where any person shall, by his last will, have directed any slave to be set free, it shall be the duty of the executor to petition the county court, as by the previous laws prescribed. And if the executor should fail, or refuse, it should be lawful for such slave to file his bill in equity by his next friend; and upon its being made to appear to the court, that said slave ought to be free, the chancellor should so order; and he is given jurisdiction to make all necessary interlocutory orders to secure the rights of the respective parties.

Under this act, Fisher's negroes filed their bill; brought before the court the proper parties; were placed in the hands of a receiver, and the cause ready for hearing. Then was passed the act of 1831, ch. 101., professing to explain the act of 1829. It declares the act shall, in no wise, be construed to extend to any case where the will was made before its passage. To all subsequent cases, the act of 1829 still applies, and is in full force. In other words, the act of 1831 attempts a repeal of the jurisdiction of the chancellor in the case of Fisher's negroes; and orders the chancellor at the next term to dismiss the cause. It next directs the clerk of the chancery court, to transmit to the clerk of the county court, the whole of the records and proceedings in said cause, which shall stand for trial at the first term of the county court. The act declares that of 1829 did not embrace such a case as that of Fisher's negroes; that the chancery court had no jurisdiction of it; and is in effect a positive mandate sent to the chancellor, in the form of an act of assembly, "to strike the cause from the docket of his court," because, by the act of 1829 he had no jurisdiction, and had misconstrued the law. The chancellor had made interlocutory orders in the cause; he consolidated it with two others, between the administrator with Peter Fishers's will annexed, and the principle legatee of the estate. Nothing but a final decree was want-

ing to end the controversy, and settle the account of the estate, so intimately blended with the emancipation of the slaves, who were also legatees, that it was impossible finally to decree, until this was done or refused. The previous orders made in the causes, the legislature, by the act of 1831, attempted to reverse, and ordered directly the principal bill to be dismissed.

By the act of 1829, the chancery court had undoubted jurisdiction of the cause. By article fifth of the constitution, the *judicial power* is to be vested in such courts of law and equity as the legislature may establish. It is an independent *power*, and where it has jurisdiction, a sovereign power, just as much as the legislature itself. He, who has a lawful right, and a legal remedy to enforce that, and the jurisdiction of a court has attached upon it, is entitled to judgment. The legislature has no power to close the courts. The courts shall be open, and every man shall have remedy by due course of law. That is, every man having a legal right, and an open remedy. Art. 11, sec. 17. The legislature may confer a right, and give a remedy to a slave. Having opened the courts to him, he is entitled, independent of his color or his civil condition, to have justice administered in the due course of law, without denial or delay. Peter Fisher's negroes, by his will, took a right, a common law right, one binding on the executor, as a trustee; but their remedy rested with him; he might petition the county court, or not, at his pleasure. If he did, the distributees of Peter Fisher could not complain. The case of David's negroes, 2 Yerger's Rep. 563. The act of 1829 gave a remedy to the slaves; not as against Peter Fisher's representative, against him as trustee; the previous law would have offered a remedy in equity; but the state as a third party had to assent to the manumission.

The state could not be sued until a remedy was provided. The act of 1829 provided that remedy, in pursuance of article 11. sec. 17., of our constitution. The imperfect right to emancipation conferred by Peter Fisher's will, wanted nothing but the assent of the state to perfect it; and jurisdiction was given to the chancellor acting in his judicial capacity, according to judicial forms, at his discretion, to manumit the complainants, if he thought it consistent with the policy of the state. Though one of the widest known discretions, yet it was a legal discretion, and one he dare not refuse to exercise, either for or against the complainants. On this ground we exercise jurisdiction on this branch of the cause on appeal. Had the discretion been unrestricted, no appeal would have lain.

The legislature had no power to dismiss the bill, and to close the chancery courts against the complainants. This is not denied by the argument of the opposite counsel ; but it is urged, that a change of jurisdiction, from the chancery court to the Sumner county court, was within the power of the legislature. That the legislature had the power to withdraw the cause from the chancery court, and order that court to send it to the Sumner county court for hearing, I think is clearly true, if the county court either had theretofore jurisdiction to hear the cause, or if the legislature then conferred the jurisdiction. But the county court had no chancery jurisdiction by any previous law to that of 1831, and no power to finally hear the cause, in the form it would have been presented. Having no cognizance of the subject matter, the act of 1831 was a naked mandate to the chancellor to turn the complainants out of this court, and there leave them, unless the act conferred jurisdiction of the cause, as a chancery cause, on the county court. Did it do so ? The act tells us the cause shall stand for hearing in the county court at the first term, under the same rules, regulations, and restrictions, as if the said suit had been originally instituted in said county court. The court was to try the cause, not according to the rules and restrictions of the chancery court, but according to its own rules, long in force by the acts of 1777 and 1801, for the emancipation of slaves. That is, by petition, not by the slave, (he could not come into the county court, or sue there,) but the master, or his executor, setting forth the motives for the manumission ; which, if approved, the court shall grant the petition, and record the evidence of the emancipation. Had the cause gone to the county court, the complainants had no right to take a single step as actors. The court had no right to take a single deposition on their behalf, or make any order or decree against James Dabbs or J. Fisher, or even to compel Baker, the receiver of the court of chancery, who had the complainants in possession, to deliver them to a receiver of the county court.

An attempt to decree the legacy left the negroes to order an account for their hire, amounting to eight hundred dollars, would have been wholly beyond any powers of that court. None such are claimed for it. I therefore think, as my three brother judges have all along thought, that the act of 1831 was a naked mandate to the chancellor to dismiss the bill ; that the act was retrospective of the rights of the complainants, and is void ; and that the chancellor did not err in hearing the cause.

8.

VOLSAIN et al v. CLOUTIER. Oct. T. 1831. 3 Louisiana Rep. 170.

Per Cur. Porter, J The plaintiffs contend, that they are free, because their mother was free. The proof of her freedom is offered in an act made by their grandmother previous to their birth. It is dated on the 27th day of December, 1797. She had the preceding year purchased her daughter, and in this act she declared, that from maternal love and affection she thereby gave freedom to her daughter from the moment of her, the donor's death. In other words, she made her daughter a *statu liber*.

When the parent of a slave declares in a public act that she gave her child freedom from the moment of her death, the child is made a *statu liber* until the happening of the event upon which it becomes free.*

But the plaintiffs insist, that this declaration, on the part of the mother, manumitted the daughter. And in support of their position they rely on the Roman Code, lib. 7. tit. 6. no. 9.

We have examined the authority, and it appears to us manumission did not necessarily result from such a declaration. That it is a presumption which the law raises from the parent calling the slave his child in a public instrument; and nothing in the provisions of the Roman law prevented the father or mother holding the child in slavery, when either qualified the acknowledgment in the authentic act. The laws of Spain in relation to father and son did not prevent their holding each other as slaves; and we think, that as they were permitted to hold either as a slave, they might hold him as a *statu liber*, and make him such.

* In some of the states a special legislative grant is requisite to a valid emancipation. This appears to be the case in Georgia, South Carolina, Alabama, and Mississippi. See James' Dig. 398. act of 1820.; Prince's Dig. 456; act of 1801; Toulman's Dig. 632.; Mississippi Rev. Code 386. In North Carolina the right to emancipation is made to depend upon meritorious services done by the slave, and which are to be adjudged of and allowed by the county court. Haywood's Manuel, 525. 529. And in Tennessee, by the act of Nov. 1801, chap. 27., the court have power to emancipate on a petition presented to them for that purpose. In Kentucky, Missouri, Virginia, and Maryland, this power is not vested in the legislature or the courts, but may be exercised by the master, under the rules and regulations established by the statutes of those states. 2 Litt. & Swi. 1155.; 2 Missouri Laws, 744.; 3 Hen. Stat. 87.; 1 Rev. Code Virginia, 433.; Maryland Laws, Nov. 1809, ch. 171, and the act 1796, ch. 67.

9.

CATIN v. D'ORGENOY'S HEIRS. June T. 1820. 8 Martin's Louisiana Rep. 218.

A slave, who has a deed of emancipation, under which she is to be free, at the grantor's death, is, in the meanwhile, a *statu liber*, and children born from her in the meanwhile, are slaves.

The plaintiff claimed the freedom of her children, under a deed from her former master, the defendant's ancestor. They pleaded the general issue. There was judgment for them, and she appealed. The defendant's ancestor, in the deed of emancipation produced by the plaintiff, says, "I hold, as my slave, a creole negro girl named Catin, aged 18 years, born in my service from the negro woman Martha, to whom I gave her freedom according to the terms of the deed, which I executed before the present notary, last year, 1801, and I have offered to the said Catin her freedom, on certain conditions (*terminas*) which I shall express, gratuitously and without interest, in consideration of the good services of her mother, the said Martha. In consideration whereof, I grant by these presents, that I emancipate and liberate from all subjection, captivity, and servitude, the said negro Catin, my slave, with the qualification and condition, (*calidad y condition*) that she shall hold and enjoy freedom, (*tener, disfrutar y gozar*,) immediately after my death. But during my life she is to remain in my service and power, continuing and contributing her services, as she has done to the date of these presents. By virtue of which, and immediately after my death, and thenceforward, she may deal, contract, sell, and purchase, appear in court, execute deeds, make a will, as a free person," &c. The children were born after the deed, but before the death of the grantor.

Per Cur. Mathews, J. The decision of this case depends entirely on the construction to be given to the act of emancipation, by which the appellant claims to have been made free, at the time of the birth of the children, for whom she now claims freedom. We are of opinion, that the court below has given a just interpretation to said act, and was correct in considering the mother to have been of that class of persons, known to the Roman law, by the appellation of *statu liberi*, and that children born from her, while in such a state, are not entitled to freedom. Judgment affirmed.

10.

HOPKINS et al v. FLEET. Aug. T. 1812. 9 Johns. Rep. 225.

The overseers of the town of Oysterbay gave a certificate in writing, "that the bearer Jordan, the slave of Hopkins, appeared to be under the age of fifty years, and of sufficient ability to get his living;" and at the bottom was written: "we do hereby manumit the same." And the certificate was signed by the overseers, but not by the executors of Hopkins, to whom the slave belonged, and the certificate was duly recorded.

Settlement
of.

The court held, that this certificate, registered at the request of the executors of Hopkins, was conclusive evidence to charge the town with the future maintenance of the slave, and in the opinion of the court, manumitted the slave.

11.

BAZZI v. ROSE and her child. May T. 1820. 8 Martin's Louisiana Rep. 149.

Per Cur. Martin, J. The petition states, that these defendants are the plaintiff's slaves, and obtained a writ of *habeas corpus* from the president of the criminal court, on which they were discharged; that the proceedings therein are erroneous in law and in fact. The answer avers the freedom of the defendants, and there is a plea of presumption. There was judgment for the defendants, and the plaintiff appealed.

If an informal emancipation takes place the master promising to comply with the legal formalities, his rights are not thereby affected, before the formalities be observed.

There comes up with the record, a number of depositions, and several bills of exceptions, no part of which it appears necessary to examine. The defendants claim their freedom, under a deed of emancipation from the plaintiff. *Liberæ vel non*, is the only issue which can exist between the parties. If they be slaves, they cannot contest the plaintiff's title to them. They have no capacity to stand in judgment for any other purpose than to establish or defend their claim to freedom. *Trudeau's ex'r v. Robinette*, 4 Martin's Rep. 580. The act of emancipation introduced by the defendants, is dated St. Jago de Cuba, May 24th, 1805, and purports, that the plaintiff "desirous of acknowledging the signal services of Gertrude, a Congo negro woman, aged 44 years, on several occasions, gives freedom to her and her child Rose, aged 10½ years, to be fully enjoyed without any trouble; promising, in due time and place, to comply with the formalities which the law requires."

The parish court "considering that the plaintiff, by sending the act of freedom, which he had directed to be passed in the island of Cuba, in behalf of the defendants, in order that it might be deposited here with a notary public, to make it valid, as well by his long silence thereon afterwards, as by his subsequent conduct with regard to the defendant Rose, and her free baptized children, until lately, when he thought he had good reason to complain of her, had thereby completed and confirmed his act of freedom (which, in the opinion of the parish court, on the circumstances of this cause, the favorable application of the law must protect,) gave judgment for the defendants. In the correct decision of this case, it is all important to decide, whether the defendant, Rose, acquired her freedom in St. Jago de Cuba by the execution of the deed which the plaintiff has caused to be recorded here. It is not pretended that she had any claim to freedom when she left the island of Cuba, exclusively of the contents of this deed. For, if she arrived here a slave, she must still be considered as such, unless she has been emancipated according to the laws of this state, and this is neither alleged nor proven. The *Partida* 4. 22. 1., requires, that where emancipation takes place in writing, it be done before five witnesses. *Es menester que quando lo afforase per carta, o ante sus amigos que lo fuga ante cinco tes tigos.* Gregorio Lopez, in his commentary on this law, says, this solemnity has been held unnecessary; but the writer does not quote or allege any law in support of the assertion; and Lopez concludes that it is: *non allegat legem quae suum dictum probet, unde servanda est ista lex quae vult hoc esse necessarium.* The grantor, in executing this deed, knew his right was not thereby destroyed, since he promised to fulfil the formalities, the *sine qua non* which the law required.

It therefore results, that the execution of this writing, or deed, did not render the defendant free. Nothing shows that any thing did happen in Cuba by which the defect of the deed was cured. If these defendants were slaves on their leaving Cuba, they were so at their landing in this state. Here the law requires certain formalities for the acquisition of freedom, none of which are pretended to have been fulfilled. Is the record of the deed, in the office of a notary, an act under which the defendants may claim their freedom? We think not. It is contended, that the admission of the plaintiff, that he executed the deed, makes full proof against him, and that the Spanish law requires the presence of witnesses to protect the grantor against the perjury of a single witness. The

laws of most countries require formalities or ceremonies to attend the execution of certain contracts; and although these formalities and ceremonies generally, perhaps universally, tend to secure a stronger evidence of the contract, this is not perhaps the only object. In the case of an emancipation *delante sus amigos*, in the presence of friends and before five witnesses, without writing, spoken of in the *partida* cited, the required presence of five witnesses might not always protect against the perjury of a single witness. For the emancipation would be proven, if he deposed it took place before him and four witnesses, dead since. The presence of a magistrate, the attendance of an unusual number of witnesses, the affixing of a seal, are all circumstances which, besides securing more evidence, are attended with this particular advantage: they make a strong impression on the mind of the party, excite reflection in him upon the subject he is engaged in; they ordinarily require time, and, consequently, afford an interval for thought and awake apprehension, and are no contemptible guards against circumvention, fraud, and surprise. 1 Haywood's Rep. 203. Farther, the deed itself shows, that the grantor did not intend to destroy, *ipso facto*, his right on the defendant, Rose; he knew what he then did had no such effect; for he agreed, at a future time, to comply with the formalities which the law required. What he did must then be considered, notwithstanding the words in the first part of the deed, as a manifestation of his intention to free the defendant Rose, and her child, at a future day. His subsequent conduct, till the record of the deed in the notary's office, shows that such was his apprehension. Is the case altered by this record? We think not. If the plaintiff held legally the defendants as his slaves when they landed in Louisiana, they must have remained so, unless emancipated according to our laws; and this is not pretended to have been done. It is, therefore, ordered, adjudged, and decreed, that the judgment of the parish court be annulled, avoided, and reversed, and that the defendant Rose, and her child, be decreed to be the slaves of the plaintiff.

12.

In the case of NEGRO TOM. Feb. T. 1810. 5 John's Rep. 365.

Habeas corpus to Adolph Waldradt, to bring up Negro Tom, whom he claimed as his slave. A contract to manumit is obligatory.

It appeared that Adolph had purchased the slave of Johanna ry.

Waldradt, who had given Tom a certificate in writing that he "manumits the said negro slave Tom, from and after the death of him, the said Johannas, in spite of all bills of sale, or last will by him thereafter to be made." Johannas having died, the slave claimed to be free.

Per Cur. We think the negro is free by reason of the certificate of manumission given by Johannas Waldradt, in his life time ; and he must therefore be discharged.

13

OATFIELD v. WARING. May. T. 1817. 14 John's Rep. 188.

Emancipation may be presumed.

To an action of assumpsit for supporting the defendant's slave, he gave in evidence the will of his father-in-law, by which he bequeathed the plaintiff to his three children. The plaintiff, then, to prove his freedom a writing sealed by the children of the testator, by which they manumitted him, on condition that he served them three years, which service was performed. The court below ruled, that a manumission by two of the joint owners of the plaintiff, amounted to a destruction of the entire interest, and gave him his freedom, especially where the third joint owner has for a long time suffered him to act as a freeman, without a claim.

Per Cur. *Spencer, J.* The manumission of the plaintiff by two or three joint owners would, of itself, make him a freeman.* No person can be partly a slave, and partly free, or a slave for one third of the time, and free for two thirds ; he must be one or the other entirely. The manumission by two may be considered a destruction of the tenancy in common, and a conversion of the slave, as it regards the proprietor of one third. And suffering the plain-

* With respect to emancipation, it may be stated as a principle without an exception, that, as slaves are considered as property upon which creditors have a right to look for the payment of their debts due by the owners of slaves, regard must be had to the rights of the creditor ; and no emancipation is valid when those rights are violated. By the Rev. Code of Virginia, p. 434., any emancipated slave may be taken in execution for a debt contracted by the person emancipating the slave, if the indebtedness existed before the act of emancipation. And in the acts of some of the states, an express provision is to be found guarding the right of emancipation, and saving the rights of creditors. 2 Litt. & Swi. 1155. § 27.; Act of 1798.; Mississippi Rev. Code, 386.; Civil Code of Louisiana, art. 190. And this protecting law in favor of creditors is extended to widows, entitled to one third of their husband's personal estate. 1 Virginia Rev. Code, 435.; Mississippi Rev. Code, 386.; 2 Litt. & Swi. 1246.

tiff to act as a freeman without any claim or pretence that he was a slave, until this suit was brought, would authorize the inference of manumission by the other tenant in common. All presumptions in favor of personal liberty ought to be made.

14.

HAMILTON v. CRAGG. June T. 1823. 6 Har. & Johns. Rep. 16.;
HALL v. MULLIN, 5 Har. & Johns. Rep. 190.

Under the statute of 1796, ch. 67. § 13., the court held, that an infant unable to gain sufficient maintenance and livelihood, cannot be manumitted; nor can a slave be set free who is not both under the age of 45 years, and able to *work* and *gain* a sufficient maintenance and livelihood at the time the freedom is intended to commence.

An infant cannot be emancipated.

15.

MOSES v. DENIGREE. Nov. T. 1828. 6 Rand's Rep. 561.

The Court, *Carr*, J., held, in this case that a deed of emancipation of the slave executed in 1781, declaring the slave free when he should arrive at full age, which would be in 1796, is void by the act of 1723, by which emancipation is prohibited except for meritorious services, and by permission of the governor and council; that the case of *Pleasants v. Pleasants*, 2 Call's Rep. 319., carried the law far enough, although it violated no statute. The will merely directed, that his slaves should have their freedom whenever the laws would permit it, and created a trust to support the devise. And the court said, that emancipation by deed or will, made before May, 1782, of a slave, even where freedom is to take effect at a future time, is unlawful and void.

(B) BY WILL.

1.

MARY v. MORRIS, et al. Aug. T. 1834. 7 Louisiana Rep. 135.

The plaintiff claimed freedom under the will of one Marshall, who held her in slavery in the state of Georgia. The testator died, and the slave was taken by the testator's daughter to Louisiana, and there sold by the executors of her husband after his decease.

A bequest of liberty to slaves in contravention of the law of the state is void.

The defendant pleaded, that the will of Marshall devising freedom to his slaves was void ; that by the laws of Georgia a slave could only be set free by a legislative act.

The district judge thought, that slaves, being passive in their situation and character, it was the duty of the executor to see the will executed, which he viewed in the light of a contract. Judgment for plaintiff. Appeal.

But the court reversed the judgment, and held, that the bequest in the will being prohibited by the laws of Georgia, where it was made, is null and void; that the bequest of liberty to slaves, which is made in contravention of the law of a state enacted for the security of the public peace and good order of the community, is absolutely null and void, and such slaves do not, *ipso facto*, become free under the will, or being brought into this state where slavery is tolerated, but in which slaves may be manumitted by will. And see *Pleasants v. Pleasants*, 2 Call's Rep. 319., where a devise of freedom to depend upon a subsequent contingency (as where the state should grant a right to emancipate) was valid.

So where
the will is
declared
void.

2.

CHASTEEN v. FORD. Spring T. 1824. 5 Little's Rep. 268.

Trespass, by Ford, a man of color, against Chasteen, to recover his freedom.

It appeared, that Lewis Chasteen made his will, and devised, that all his slaves should be set free on their arriving at 25 years of age. The children of the testator exhibited a bill in equity against the executors, alleging the invalidity of the will, and praying a decision of the court thereon. The court pronounced against the validity of the will. Ford arrived at the age specified in the will after the court had pronounced against its validity. And the question on these facts is, whether Ford was entitled to his freedom or not.

Per Cur. Owsley, J. Ford claims his freedom under the will ; and was the question of his right governed exclusively by the import of the will, we should have no difficulty in pronouncing Ford a free-man. He had arrived at the age of 25 years, the commencement of this action, and the will expressly declares he should be emancipated at that age.

But the will has been declared to be inoperative, by the decree

of a court of equity, and that decree was, in argument, contended to be conclusive in the present case. But Ford was no party to that suit; and it was insisted in argument, that as to him the decree can have no operation in this contest. It must not be forgotten, that at the time the decree was pronounced, Ford had not arrived at the age to which, by the will, he had to arrive before he was entitled to his freedom. He could not, therefore, have been made a party, and the failure to have made him a party, cannot be alleged to render the decree inoperative as to him.

3.

CHEW v. GARY. June T. 1825. 6 Har. & Johns. Rep. 526.; S. P. HUGHES v. NEGRO MILLY et al., 5 Har. & Johns. Rep. 310.; HAMILTON v. CRAGG, 6 Har. & Johns. Rep. 16.

Suit for freedom. Mary Ann Wood devised as follows: "My will and desire is, that all my negroes shall be free, except my negro woman Nanny; and my will is, that she shall serve my mother Ann Brown during her life, and at her death, my said negro woman Nanny to enjoy her freedom." The petitioner for freedom was the child of Nanny, and was born after the death of Mary Ann Wood, and during the life of Ann Brown. The defendant demurred to the petition, and the court ruled the demurrer sufficient, and the petitioner appealed. Judgment affirmed.

4.

In the Matter of NAN MICKEL, a Negro Girl. Aug. T. 1817. 14 John's. Rep. 324.; S. P. PETRY v. CHRISTY, 19 Johns. Rep. 53.

The testator, by his last will, devised as follows: "I manumit and give freedom to my negro woman, Mott, and her daughter Nan, immediately after my decease." After the date of the will the testator sold Nan. On a *habeas corpus* to the assignee of the purchaser, the question before the court was, whether Nan was entitled to her freedom.

Per Cur. The sale made by the testator after making his will was, *pro tanto*, a revocation of his will. The will has no effect before the death of the testator. Although a manumission of a slave does not rest upon the principles of a contract, but is an act of benevolence, sanctioned by the statute, and made obligatory if in

The act of manumission must be perfected, as by delivering a certificate or writing to the slave or some third person for his benefit.

writing; yet such writing ought to pass out of the hands, and from under the control of the master. In all the cases we have had before us on this question, the certificate of the master has either been delivered to the slave, or to some third person for his benefit, and the act has thereby become consummated. But in the case before us, it must be considered as resting only in intention. No act has been done that is binding on the master. We are of opinion, therefore, that the girl is not entitled to her freedom.

5.

PLEASANTS v. PLEASANTS. 2 Call's Rep. 319. 357.

The testator, by his will in 1771, directed, that "all his slaves should be free, when they arrived at the age of 30 years, and the laws of the land would permit them to be free without being transported out of the country; that is, all his slaves now born, or hereafter shall be born, whilst their mothers were in the service of him or his heirs, to be free at the age of 30 years, as above mentioned, their age to be adjudged of by his trustees." He then gave his son Robert eight negroes, "on condition he allowed them to be free at the age of 30 years, if the laws of the land would admit of it;" and then devised the residue of the slaves to sundry persons under similar conditions.

Held by the court, that the limitations were good in the event of such a law being passed, while the slaves remained in the possession of the family, without change by the intervention of creditors or purchasers; it being considered too rigid to apply the rule respecting the limitation of the remainder of a chattel upon too remote a contingency, with all its consequences, to the present case; but that a reasonable principle ought to be adopted to suit its peculiar circumstances. And, therefore, after the passage of the act of 1782, permitting the emancipation on certain conditions imposed to prevent persons emancipated from becoming burdensome to the community, the court being of opinion that the limited manumission, according to the modifications in the will could alone take place, and that the terms for securing the public against the maintenance of the aged and infirm, could not be equitably imposed upon the devisees, it was decreed that all the slaves (not subject to the claims of creditors or purchasers) who at the date of the decree were above the age of 45, and their increase born after their respective mothers had attained the age of 30 years, should be emancipated so soon as the executor of the several trustees, or any

other person, should, in the courts of the several counties in which the slave respectively resided, enter into bonds with approved sureties, payable to the justices then sitting in each court, and their successors, with condition, that the said slaves should not become chargeable to the public, or should enter into one such bond for the whole in the general court; that all who, at the same date were above 30 years, and under 45, should be immediately emancipated and set free to all intents and purposes, as if born free; and that all who at the same date were under the age of 30, and whose mothers had not attained that age at their birth, and all their future descendants, born while their mothers were in such service, should serve their several owners until they should arrive at 30 years of age, and then be free.

6.

WALTHALL'S EX'RS V. ROBERTSON et al. June T. 1830.

2 Leigh's Rep. 189.

In the year 1819, Francis Walthall made his will, and devised as follows: "Item, if it be agreeable to the laws of this state, (Virginia) in which I live, that after the death of my said wife Mary, it is my will and desire, that the following slaves owned by me, viz. Joan, Sen'r, Gary, Jack, Tom, and Peter, shall, as soon as they attain the age of thirty-one years, be freed; and I appoint my friends, J. Morris and E. H. Hendrick, trustees for the liberation of said slaves, and for them to make the necessary application to the court on said slaves' behalf, both as to their freedom and remaining in the state. If the laws of the state be against such procedure, then my will is, that said slaves be equally divided among my children." After the death of the testator's widow, his children brought a bill against the executor, Morris, in the county court of Buckingham, who decided they were not entitled to their freedom, and decreed a division among the plaintiffs. The executor appealed to the superior court of chancery of Richmond, which affirmed the decree, and then he appealed to this court.

Per Cur. Cabel, J. The testator, by his will says, if the law will suffer my slaves, if emancipated, to remain in Virginia, I free them. If the laws will not suffer it, I give them to my children.

Per Green, J. The question is, whether the testator intended that the slaves in question should be freed (to use his own expression) upon his wife's death at all events, unless the law in force

A conditional emancipation is valid, and is effective when the condition is performed.

when that happened should prohibit emancipation upon any terms? or, that they should be *freed* only in the event that the laws should then permit emancipation, and those emancipated to remain in the state, by leave of the courts, or otherwise. This last was the construction adopted by the courts below, and I think the construction the correct one. The expression, "If the laws of Virginia be against the said procedure," refers to all which the testator had directed to be done, both to the emancipation of the slaves, and procuring permission to them to remain in the state. And by the law at the date of the will, and the testator's death, the slaves could not be allowed to remain in the state. They are not entitled to their freedom, and the decree ought to be affirmed.

7.

RUCKER'S ADM'R v. GILBERT. May T. 1831. 3 Leigh's Rep. 8.

As to be
free at the
death of the
testator.

Rucker by his will declared, "Item, it is my will and desire that my mulatto man, James Gilbert, should be free; but finding there would be some difficulty for it to be so, and for him to remain here, I therefore request my executors to lay off three acres of land for said James Gilbert, at any corner of my land, and let him settle on it, that he may think proper, and he is to have it during his natural life, on good behaviour, and then to return to my estate."

After the death of the testator, Gilbert brought a suit in *forma pauperis*, against the administrator to recover his freedom, and the county court gave judgment in his favor; and the administrator appealed to the circuit court, which affirmed the judgment, and he appealed to this court.

Per Cur. Brooke, J. Did the testator intend Gilbert should be free at his death? If he did, the provisions in the will were very inconsistent. He says, "It is my will and desire that my mulatto man, James Gilbert, should be free." If he had stopped here, there would have been no doubt, that James Gilbert would have been free: and here he would have stopped if he had simply intended to emancipate him; but finding, as he says, "there would be some difficulty for it to be so, and for him to remain here" that is, as a freeman, he does not desire his executors to remove that difficulty, by sending him out of the state, but desires them to lay off three acres of land, which he is to have on good behaviour; certainly not as a freeman, because, as such, he could impose no

such condition upon him ; nor could he, as he has done in the last member of the clause, subject him to the control and direction of his executors, in the character of a freeman.

However much the testator might have desired that Gilbert should be free, it was very clear, that he was deterred by the difficulties which the law presented with respect to residence here, and under the circumstances, determined to do what he considered next best for him, to settle him for life on a piece of land, there to enjoy the fruits of his own labor. Both judgments reversed, and judgment entered for appella t.

8.

MOOSA V. ALLAIN. Dec. T. 1825. 16 Martin's Louisiana Rep. 99.

Appeal from the court of the fourth district.

Per Cur. Martin, J. The plaintiff states, that he was, before the death of the late Julien Poydras, a slave for life of said Poydras ; who bequeathed to all his slaves their freedom, on the following conditions : That each of his plantations should be sold, with all the slaves who might be on each of them respectively. 2d. That all said slaves should be considered as attached to, and inseparable from, the respective plantations on which they were at the time of the sale. 3d. That the purchasers of said plantations respectively, should be bound to keep thereon all the negroes purchased with each of them, during twenty-five years, and at the expiration of that period to enfranchise them. That B. Poydras purchased one of said plantations, situated at Fausse Riviere, with a number of slaves attached thereto, of which the plaintiff was one ; and afterwards sold it with the said slaves to one of the defendants, with the conditions mentioned in the will, as aforesaid, which was mentioned at the sale, and inserted in the *procès verbal*. But that the said defendant, in violation of them, sold him to Villeneuve Leblanc the other defendant, who has brought the plaintiff to the parish of West Baton Rouge, against his will and inclination, and intends to remove him out of the state. The petition concludes with a prayer for the recession of the sale of Leblanc ; that he may be ordered and decreed, to restore the plaintiff on the plantation at Faussee Riviere, with which he was sold, and be enjoined from removing him therefrom. The defendant pleaded the general issue. There was judgment for the defendant, and the

Whether a slave who is directed to be set free by the last will of his master can have the intervention of a magistrate to prevent his removal out of the state, *quere.*

plaintiff appealed. By a clause of the will, the testator directs the terms of sale of his plantations and slaves in the following words : " The sales of any of my plantations, as to the slaves which are attached to them, (and all my slaves are to be considered as attached to them,) is to be made, with the obligation imposed on the purchaser of my plantations, their heirs and assigns, all the slaves, of either sex, who shall be sold with the said plantations respectively, even the children born or to be born, at the expiration of twenty-five consecutive years, from the date of the sale. And the slaves, who at this epoch may not have the legal age for emancipation, shall be bound to work for their respective purchasers, their heirs and assigns, till they reach that age ; when they are to be emancipated as aforesaid. Likewise, the purchasers of my said plantations are to be bound for themselves, their heirs and assigns, to have care of, and treat with humanity, and keep on said plantations respectively, without requiring any labor from them, all such slaves so purchased, who may evidently have attained the age of sixty years, and pay them annually a sum of twenty-five dollars, as a relief against the infirmities of age. These terms are to be rigorously executed, and all persons, in the name of humanity, and particularly the officers of the state, are authorized and requested by me, to cause them to be executed and respected." The right to remain on the plantation, with which each of the testator's slaves was sold, is only given to those who may have attained the age of sixty years, at the expiration of twenty-five years from the sale. In the mean while the right of a purchaser to the labor of the slaves, wherever he chooses to have it performed, is perfect, unless, perhaps, the slave may be allowed the aid of the magistrate, in case of an evident attempt to transport him out of the jurisdiction of the state, in order to frustrate his hope of emancipation, under the will and sale, by compelling the purchaser to give security for the forthcoming of the slave in due time, or otherwise. In the present case, there is no evidence of even an intention of the defendant, Leblanc, to transport the plaintiff. Judgment affirmed.

9

BURROUGH'S ADM'R v. Negro Anna. June T. 1817. 4 Har. & Johns. Rep. 262.

Petition for freedom. The petitioner was the slave of one Burroughs, and claimed to be free under his will, which was in the following words: "I give and bequeath unto my negro woman, called Anna, her liberty, and the advantages of her son as a laborer so long as she lives, and a young bay mare three years old next spring, and four barrels of Indian corn, and three hundred weight of pork, and one black cow about six years old, and a hoe and an axe, and a spinning wheel and card, cotton cards, and one iron pot, &c., and it is my will and desire, that my man Josias, her son, be the entire right and property of her, the said Anna. At the time of the death of the testator she was about forty-five years of age. The defendant is the administrator of the testator. The county court gave judgment for the petitioner, and the defendant appealed to this court. Judgment reversed.

A devise to a slave over forty-five years is invalid.

10.

QUARLES v. QUARLES et al. March T. 1811. 2 Munf. Rep. 321.

The court held, that where slaves are specifically bequeathed to a child, when he or she shall attain the age of twenty-one, or shall marry, and no provision is made for maintenance in the mean time, their intermediate profits, if not otherwise disposed of, do not pass by a general residuary clause, but they belong to the legatee; and the same rule applies to the interest from the time of the receipt thereof by the executor, and no good reason appearing for failing to apply the principal to the use of the legatee. See *Graham v. Woodson*, 2 Call's Rep. 249; *Coke v. Wise*, 3 Hen. & Munf. 463; *Dilliard v. Tomlinson*, 1 Munf. 183. 214.

The profits of slaves specifically devised go to the legatee.

HARRIS v. CLARISSA AND OTHERS. March T. 1834. 6 Yerger's Tennessee Rep. 227.

This was an action of trespass and false imprisonment, brought by the defendants in error against the plaintiff. The defendant below pleaded, that they were slaves for life. Upon the trial it was proved that Clarissa was originally a slave, the property of Thomas Bond, a citizen, at the time of his death, of the state of Maryland.

A citizen of Maryland in the year 1800, made his last will and testament, in

which is the following clause: And further, my mind and will is, that all the negroes which I have here-inbefore given to my children, which are under the age of twenty-five years; and also, all the young negroes which I may have in my possession at the time of my decease, shall have their freedom when they respectively arrive at the age of twenty-five." Held, that the children of the female slaves, who by this provision were entitled to be free at twenty-five, were free also, although born before their mother was twenty-five years old.

Bond died in 1800, and his last will and testament contains the following clause: "And my mind and will further is, that all the negroes which I have herein before given to my children, which are under the age of twenty-five years, and also all the young negroes which I may have in possession at the time of my decease, shall have their freedom when they respectively arrive at the age of twenty-five." Clarissa was one of the young negroes belonging to said Bond at the time of his death, she being then about ten years old. Hannah, Delia, and Edward, three of the plaintiffs, are children of Clarissa, and were born after the death of said Bond, and before the said Clarissa arrived at the age of twenty-five. Edy and Martha, two of her children, also plaintiffs, were born after she was twenty-five years old. They were all born in Tennessee, and neither of the children are twenty-five years old. It was admitted, that slaves could be set free in Maryland in 1800, by last will and testament. The defendant derived title to the plaintiffs through Mrs. Eliza Love, a daughter of the said Thomas Bond. The court charged the jury, that Clarissa would not be free until she arrived at the age of twenty-five. That when she arrived at that age she was free, and all her children born after that period were free; but, as to those born before she was twenty-five, they would be slaves until they arrived at the age of twenty-five, and then they would also be free; and that in no case could they be held and deemed slaves for life. The verdict of the jury was, "that they find the issues in favor of the plaintiffs; and that the said Clarissa and her two youngest children, Edy and Martha, are not slaves; and that the three eldest children, Hannah, Delia, and Edward, will be free when they arrive at the age of twenty-five.

Per Cur. Catron, Ch. J. Thomas Bond, a citizen of Maryland, in the year 1800, made his last will, by which he liberated several of his slaves, and amongst other devises and bequests were the following:

1st. I give to my son, Phil. Bond, a negro man, Bishop, to serve him five years after my death; and at the expiration of said five years, the said Bishop to be a freeman.

2d. I give to my son Edward Bond, one negro boy named Jim, aged fourteen years, to serve him until he is twenty-five years of age, and then at the expiration of the time to be a freeman.

3d. I give to my son, Thomas Bond, a negro boy named Frederick, aged twelve years, to serve him until twenty-five years of age, and then at the expiration of that time to be a freeman. One

negro boy named Abelard, aged one year, to serve him until he is twenty-five years of age, and then, at the expiration of that time, to be a freeman.

4th. My will is, that my negro woman named Dinah, shall have her freedom at my death; my negro woman, Suck, to have her freedom at the expiration of three years after my death; my negro woman, Rachel, shall have her freedom at the expiration of five years after my death; negro Betty, which I have given unto my daughter Elizabeth Gibson, shall have her freedom at the expiration of four years after my death.

And further, my mind and will is, that all the negroes which I have hereintoforesaid given to my children, which are under the age of twenty-five years, and also, all the young negroes which I may have in my possession at the time of my decease, shall have their freedom when they respectively arrive at the age of twenty-five. Thomas Bond died in Maryland, and the will was duly proved and authenticated. The clauses recited, emancipating the slaves of the testator, were made in accordance with the act of Maryland of 1796, ch. 67. sec. 13., by which it is provided, "that from and after the passage of this act, it shall and may be lawful for any person or persons, capable in law of making a valid will and testament, to grant freedom to, and effect the manumission of, any slave or slaves belonging to such person or persons, by his, her, or their last will and testament; and such manumission, of any slave or slaves may be made to take effect at the death of the testator or testators, or at such other periods as may be limited in such last will and testament." The statute prohibits manumission to the prejudice of creditors, of slaves over forty-five, and also of such as shall not be able to work and gain a sufficient maintenance and livelihood at the time the freedom given shall commence. Clarissa, at the time of the testator's death, was about ten years of age, and claims her freedom by that clause of the will manumitting the young negroes. Before Clarissa was twenty-five, she had three children, Hannah, Delia, and Edward; after that age she had Edy, and Martha. The mother and five children all sued jointly in this action. The circuit court adjudged Clarissa free at twenty-five, and that Martha and Edy, following the condition of the mother, were free, because born after she was free. The court also adjudged, that the three children born before Clarissa was twenty-five, followed the condition of the mother, and would be free at their respective ages of twenty-five; neither of them at the time of the

time of the trial being that old. To this part of the charge, and finding of the jury thereon, error is assigned for the plaintiffs in error; and also for the defendants in error, Hannah, Delia, and Edward, who claim to have been born free.

This cause has been argued with an anxiety for the defendants in error, and with an ability on both sides, leaving the court nothing to wish, save something of information of the course of adjudication in Maryland, if any has been had there on the subject. With the lights before us, however, we have come to a conclusion satisfactory to the majority of the court.

The statute of Maryland is open to remark in explanation of the will. Young slaves incapable of supporting themselves could not be emancipated, if the freedom given was to commence during such incapacity. When making the will the testator was governed by this restriction in reference to the slave children. The statute does not give directly any powers to the testator to control the increase of the females who were slaves at his death; yet he having uncontrolled power of their freedom or slavery, it is perhaps the most consistent construction of the act to say, he had the power to declare the condition of Clarissa's children born before the freedom commenced. As to this middle state affecting the three children born before the mother was twenty-five, the legislature has not declared its will. And in giving a construction to the will made pursuant to the statute, the court must bear in mind, the claim is one involving human liberty, and that the testator's intention must be favorably interpreted to this end. 4 Am. Dig. 535.; 1 Wash. Rep. 239.; 5 Am. Dig., title "Slaves.;" Cook's Justinian, 12. 13. 4. The increase must follow the condition of the mother. If when born she was a slave, they are slaves; if free, they are free.

She was not a slave for life; this is not insisted on; but that until she attained the age of twenty-five she was a slave. So the circuit judge thought, and instructed the jury that the three children were slaves until the age of twenty-five years, when they should be free. Of course, if this construction be the true one, we have in perpetuity, slaves for a term of years; the descendants of Clarissa's daughters must be in the same condition. Let us run out the consequences of this construction. Such was to have her freedom at the expiration of three years after the testator's death; Rachel, at the expiration of five years; Betty, at the expiration

of two years. At what ages these women were free does not appear. Suppose they had children before the time arrived? Should they be free at the same age the mother attained when she was free? This is in accordance to the decision of the circuit court: or shall they be free at the end of the mother's term? Had she been a slave forever, their condition would have been the same. She being a slave for years, their condition could not be worse. The child before born is part of the mother, and its condition the same; the birth does not alter its rights. If the mother at the time of the birth be free, it is free. Justinian's Institut. by Cooper, 13. In this respect, the rule governing slave property in this state and the civil law are alike. It is confidently believed that no such middle ground can be taken in this and similar cases. We find conflicting decisions on the subject. The case of *Pleasants v. Pleasants*, 2 Call's Rep. 320., decided nothing to afford any aid. It only determined that the testator had the right to declare the condition of the children of his female slaves.

In the case of *Maria v. Sarbaugh*, 2 Randolph's Rep. 228., it is holden, that a female slave declared to be free at the age of thirty-one years, and having issue before she arrives at that age, the children are slaves for life. But we are told, the question as to the civil state of the children born before the mother attained the age of thirty-one, depends upon the true construction of the statute of 1753 of Virginia. Upon the policy of that state, growing out of, and evidenced by this and other statutes, is the decision mainly grounded. It is a most strict construction, not to say a strained one, in prejudice of human liberty, and is in conflict with the opinions of Chancellor *Wythe* and Judge *Roane*, in the case of *Pleasants v. Pleasants*, 2 Call's Rep. 338. In the case of *Ned v. Beal*, in Kentucky, 2 Bibb's Rep. 298., the supreme court held, that a female slave devised to be free in the year 1804, who had children after the testator's death, and before the year 1804 was a slave until 1804, and that the children were slaves for life. With the reasons of this decision we are not satisfied. In New-Jersey, where a will contained the following clause: "I leave my two negro girls to be sold by my executors for the term of fifteen years, and at the end of that term to be free," it was held, that the negroes ceased to be slaves from the time of the sale, and therefore a child born of one of them during the term, was free. 1 Cox's Rep. 36.; 4 Am. Dig. 534.

Something in accordance to the principles of this determination was decided in Virginia, subsequent to the case of *Maria v. Surbaugh*, in *Isaac v. West's executor*, 6 Rand's Rep. 652.; that if the construction of a deed of emancipation be doubtful, resort may be had to the rule, that the deed is to be taken most strongly against the grantor, and liberally construed in favor of liberty; a rule, growing out of the spirit of the laws of all civilized nations which favor liberty; that a deed of emancipation, by which the master manumits his slaves at his death, but directs that they shall serve him as long as he lives, and at his death go free from all persons, passes a present right to freedom, reserving a right in the grantor to their personal services during his life as a condition of the emancipation. Therefore, a child born of one of the emancipated females in the interval between the execution of the deed and the death of the grantor, is free from its birth. This adjudication proceeds upon the ground of a vested right of freedom communicated to the female, and placing her on the footing of a person bound to service for a term of years, who has a general right to freedom, but there is an exception out of it by contract. So of the New-Jersey decision. Had *Clarissa* a vested right to freedom on the death of *Thomas Bond*? As to *Suck*, *Rachel*, and *Betty*, and as to the man *Bishop*, devised for five years to *Phil Bond*, we think there can be no doubt they were intended by the testator to be free persons, held to service for a term of years; nor can we bring our minds to believe the testator meant differently, than if he had said, I will that my girl, *Clarissa*, be free, but that she serve my children for the term of fifteen years; being then twenty-five years of age, she will be able to support herself in compliance with the statute of 1796, and will have been raised to industry, and in moral habits by my children, so that she may the better enjoy her freedom. Furthermore, it is right she should pay for her raising, which by the time she is twenty-five she will have done. With this explanation, no one will deny that *Clarissa* would have taken by the will a present right to freedom at the testator's death, encumbered with a condition to serve fifteen years. In reference to *Rachel*, *Suck*, *Betty*, and *Bishop*, the testator was sufficiently explicit to the above effect, and we think he manifestly meant the same thing when emancipating his young negroes. Suppose *Suck* twenty-two, he knew her age, and he said she should serve until she was twenty-five, and then go free; how would this have differed from the words used: my woman, *Suck*, to have her freedom at the expi-

ration of three years after my death? That Clarissa rested under most of the disabilities pertaining to a state of slavery, is true ; but that she took a vested and undoubted right to freedom by Thos. Bond's will, is equally true. The children born of Clarissa, in the state of Tennessee, came into existence impressed with the rights our laws confer. They were not the slaves for life, of William Harris. They could only be his slaves until the termination of twenty-five years from the birth of their mother. Her state and condition fixed that of her increase, during the particular estate, and also after its termination. With us the remainderman takes the increase of slaves born during the term. *Timms v. Potter*, 1 Hayw. Rep. 234. ; 2 Yerger's Rep. 586. If the termor has no further title, and there be no one to take in remainder, slavery ceases of course. Such we take to be the condition of the three children born of Clarissa before she was twenty-five. But as it is insisted, that the decisions in Maryland will be conclusive of this cause, contrary to our present impressions, we will hold it up until the next term, so that they may be had, or rather such of them as we have not seen and examined.

The cause was argued, and the above opinion prepared at the March term, 1833. The case was again argued at this term, after which the chief justice delivered the following opinion of the court :

This cause was, at the last term, holden up under advisement to obtain and look into Maryland authorities. The cases of *Hamilton v. Craig*, and *Chew v. Gary*, have been produced to us. 6 Har. & Johns. Rep. 16. 526. They established the position, that if a negro woman slave be given to A. for his life, and at his death the slave to be free, the increase born of such woman during the life estate, are slaves for life, and the property of him to whom the use is limited. In Maryland, the issue is considered not an accessory, but as a part of the use, like that of other female animals. 1 Har. & McHen. Rep. 160. 352. ; 1 Har. & Johns' Rep. 526. ; 1 Hayw. Rep. 335. Suppose a brood mare be hired for five years, the foals belong to him who has a part of the use of the dam. 2 Black. Com. 290. ; 1 Hayw. Rep. 335. The slave in Maryland, in this respect, is placed on no higher or different ground. Had the defendant, Harris, continued in Maryland, and the three children born of Clarissa, before she attained twenty-five years of age, been born there, they would have been his property, just as much as the produce of the labor of Clarissa. But Hannah, Delia, and Edward, were born in Tennessee, and the defendant's right

to property in them vested subject to our laws; by which, the first taker has the same interest to the increase he has to the mother. *Timms v. Potter*, 1 Hayw. Rep. 234.; 2 Yerg. Rep. 586.; *Cook's Rep.* 113. 381. Had Clarissa been given to Harris by will in Tennessee, until she arrived at the age of twenty-five, and then over in remainder, Harris would have been entitled to her services for the term, and to the services of her children for the term; but then the mother and also the children would have gone over to the remainderman. When the title of Harris to Clarissa ceased, his title, by our law, to the three children ceased. That he has no right to their services is manifest.

North Carolina adopted the rule of nature, pertaining to human creatures, in declaring that the condition of the mother should be that of the child. The law does not separate the title: they go to the remainderman together; and if there be no remainderman to take the mother, the child goes with her. By *Thomas Bond's* will, there is no one to take in remainder. His executors were the first takers, until the young slaves respectively attained twenty-five years of age, and then they were to go free. Harris, as distributee, took the title the executors had. As first taker, his title ended when Clarissa was twenty-five. The executors have no title over, nor has any one.

As to Hannah, Delia, and Edward, the judgment will be reversed, and the cause remanded for another trial. As to Clarissa and the other children, the judgment will be affirmed, and they go free. *Green, J.*, dissented.

12.

HART v. FANNY ANN. Oct. T. 1827. 6 Monroe's Rep. 49.

William Hart devised as follows: "All the rest of my slaves, by name Alsey, Lucy, Ann, Selina and Turner, shall be emancipated, with their children, if they should have any, as soon as they severally arrive at thirty years of age, except the last mentioned, and by name Turner, who shall serve Jer'h Davis until he is 21 years of age, and then he be free."

Lucy, named in the will, and mother of Fanny Ann, attained the age of thirty years 25th of Dec. last, her child Fanny Ann being about ten years of age. Judgment, that Fanny is free, and Hart appealed.

Per Cur. *Bibb*, Ch. J. The appellant's counsel argues, that Fanny Ann's right to freedom does not accrue under the will until

A devise that Anna, Lucy, &c. shall be emancipated with their children, if they should have any, as soon as they should arrive at thirty years of age manumits the children when the mother arrives at the age of thirty years.

she arrives at thirty. The counsel for the appellee insists, that her right to freedom was consummated by her mother Lucy's arriving at the age of thirty.

The component parts of the sentence of the will reduced by grammatical rule, from the complex to the simple and natural order and arrangement, stand thus: "Alsey, Lucy, Ann, and Selinn, shall be emancipated as soon as they shall severally arrive at thirty years of age, with their children, if they should have any." The sentence thus arranged and simplified, expresses what we think the testator intended, and what is expressed by his words. After the most attentive examination, we are satisfied with the opinion that the right of Fanny Ann to her freedom is not to be postponed till she arrives at thirty years of age, but was complete on her mother's attaining thirty years. Judgment affirmed.

13.

NEGRO GEORGE et al. v. CORSE'S ADM'R. June T. 1827.
2 Har. & Gill's Rep. 1.

Petition for freedom.

The plaintiffs claimed their freedom under the will of James Corse, which contained the following words: "Imprimis, I hereby set free all my negroes of every description, in the following manner, which is to say, the men, George, David, Jim, and Henry, at my death; also the women, to wit, Maria, Beck, and Mary, with their issue in case they should have issue between this time and the period of my death; and the boys, as they severally attain the age of twenty-one; to wit: Isaac eighteen years old, Levi fifteen years old, Sandy, &c.; and the girls at the age of eighteen, with their issue, in case they should have issue; to wit: Phillis fourteen years old, and Sally twelve years old. And it is hereby provided, that if my personal estate, exclusive of the negroes, should not be sufficient to discharge all my just debts, then my will is that my executor or administrator, as the case may be, may sell so much of my real estate as will pay my debts, so as to have my negroes free as before stated."

Slaves manumitted by will where the personal estate is not sufficient to pay the debts of the testator are not entitled to freedom.

It was admitted that the personal estate of the testator, either including or excluding the negroes, was not at the time of his death, or at any time since, sufficient to pay his debts; but that his real estate, including his personal property, and excluding the negroes, were at the time of his death, and still are, sufficient to pay his debts. Verdict for defendants and the petitioners appealed.

After argument the Court, *Dorsey, Archer, and Earl, Js.*, affirmed the judgment.

They observed that until the act of 1796, ch. 67., the manumission of slaves by will was prohibited, and by the act it could only be upon condition that it shall not prejudice creditors. And they had a right to their demands out of the personal estate; and it was not in the power of the debtor (testator) to transfer their claims to the real estate; that the executor or administrator had no means of knowing whether the real estate would be sufficient. And the personal estate is the first fund for the creditor to look to for the satisfaction of his demand.

Earl, J., observed, that it is not in the power of the testator to confine the creditors to a particular fund for the satisfaction of their debts to whose demands the whole of his estate was equally liable. More particularly was it not for him to turn them over from the natural fund, to one more uncertain and less accessible.

14.

NOEL AND WIFE v. GARNETT. Oct. T. 1786. 4 Call's. Rep. 92.

Of dower
in undivided
slave.

Garnett devised to his wife certain slaves during her life or widowhood, and died intestate as to other slaves. She did not renounce the provision under the will, but held the estate devised nine years. She married Noel, and she and her husband commenced this suit to recover her dower in the undevise slaves. The court of chancery dismissed the bill, and the plaintiffs appealed to this court.

The court of appeals were of opinion, that the appellant, by not renouncing her first husband's will, was barred from recovering dower in the undevise slaves.

15.

COOKE, (a person of color,) v. COOKE. Spring T. 1823. 3 Littell's Kentucky Rep. 236.

A slave
cannot be
emancipated
by a
nuncupative
will,
nor by an
executory
or conditional
instrument
writing.

Per Cur. William Cooke entered into an agreement with his slave, Peter, to emancipate him, on the payment of two hundred and fifty dollars; or, rather, the contract was made with Seth Cooke and Abraham Bohannon, as agents for the slave, and was reduced to writing, and signed by them in these words: "A statement of a contract made by William Cooke and us, Seth Cooke

and Abraham Bohannon, as agents for Peter, a slave, on the terms following : Said Cooke agrees to emancipate Peter, for two hundred and fifty dollars, with interest on one hundred and twenty-five dollars from the 4th of June 1815, until paid the balance of the above two hundred and fifty dollars. Signed, SETH COOKE,
June 4th, 1815. ABM. BOHANNON."

In his last illness he made his nuncupative will, reduced to writing at the time it was spoken, but not signed by him, in which he directs that "Peter should be free, on the payment of fifty dollars, a balance of \$250 which Seth Cooke and Abraham Bohannon, as agents for Peter, had undertaken to pay ; which is all paid but the aforesaid fifty dollars." After his death Peter paid the remaining fifty dollars to his widow, and executrix, and brought this action of trespass, assault, battery, and false imprisonment, against the appellee, to assert his right of freedom. On the trial, it was proved, that after the date of the aforesaid contract, Peter went at large as a free person, by the indulgence of his master, who until his death always recognized the rights of Peter to freedom, on the payment of two hundred and fifty dollars. The court, on the application of the appellee's counsel, instructed the jury, that Peter could not support his claim to freedom, under the writing aforesaid, because it was an executory contract ; and that the plaintiff's remedy, if any, was in a court of equity ; and that slaves, when they pass by last will and testament, being considered as real property, could not pass by a nuncupative will. The jury found a verdict, and a judgment was thereupon rendered against Peter, and he has appealed to this court.

However strong an appeal the claim of Peter may make to the conscience or moral sense, we must accord with the court below in each of these instructions. It has been settled in this country, by the case of *Donaldson v. Jude*, 2 Bibb's Rep. 57., that the signing, sealing, and even the acknowledgment or proof of the deed or will of emancipation, were all necessary requisites to annul the relation of master and slave. It has been since decided, in the case of *Winney v. Cartwright*, Spring T. 1821, that the proof or acknowledgment of the instrument was no longer necessary, or even a seal, under a subsequent statute ; but that the right accrued at the signing of a writing expressing an emancipation. Still, however, it is necessary that the writing should declare the act done, and not merely a stipulation that it shall be done conditionally, or on the happening of some contingency. So that this

writing, even if signed by the deceased master, could not be construed to be more than an engagement to do the very act which by law would emancipate. And however strong an acknowledgment the nuncupative will may contain, of the obligation of the contract, and that Peter has fulfilled the greater part ; yet, that slaves, as far as respects wills, must be deemed and held real estate, is expressly declared by the provisions of a statute passed the 26th day of November, 1800. 2 Dig. L. K. 1247. And it is a doctrine so well established, that real estate cannot pass by a nuncupative will, both according to the provision of our acts of assembly regulating wills, and by former decisions on similar statutes, that there can be no need of quoting authority to support it.

Judgment affirmed.

16.

DUNN v. AMY et al. Nov. T. 1820. 1 Leigh's Rep. 465.

And are
subject to
debts of
testator.

Amy, James, and Ned, negroes claiming to be free, brought their bill in the superior court of chancery of Richmond, charging, that they had been slaves to one Campbell ; that Campbell died in 1819, having previously made his will, and devised as follows : " I wish Mr. Shipherd, my executor, to emancipate the above-named Amy and her child James, as also her sister Polly, and her brother Ned, and all their offsprings, should they have any ; and if possible to have leave granted to remain in the state ; if that cannot be granted, I wish them (I mean Amy the principal) to have the sum of \$1,000 as soon as it can be made after my just debts are paid ; the residue of the money to be converted into United States Bank stock, the dividend to the use of Amy and her child James, until James arrive at the age of twenty-one years ; at which time I wish them equal in the stock until her death, at which period I wish James to have all the stock, and Polly the house, that is to be left to Amy for her life. If Amy and James should die, I wish Polly and Ned to have the stock and house."

The executor, in pursuance of the will, executed deeds of emancipation of the slave, dated January 4th, 1820, and in May Term, 1821, Mitchell recovered judgment, the executoin to be levied of assets, *quando occiderint*, and the judgment was assigned to Dunn ; and in May, 1826, a *fi, fa* was sued out, and levied upon the slaves.

The court, Cabal, J., decided, that the slaves were manumitted by the will of Campbell, the testator, and not by the deed of emancipation of the executor ; but the slaves were subject, nevertheless, to the testator's debts.

(C.) BY CONTRACT.

1.

BUTLER et al. v. DELAPLAINE. Oct. T. 1821. 7 Serg. & Rawle's Rep. 378.

Per Cur. Duncan, J. Though this is a claim of freedom, we are not so much in favor of liberty as to lose sight, that this class of people are acknowledged as slaves. The master has a property in them, and contracts respecting this species of property are to be construed by the same rules of interpretation that contracts respecting any other species of property are.

Claims for freedom are favored.

2.

BEALL v. JOSEPH. Spring T. 1808. Hardin's Rep. 51.

Trespass to try Joseph's right to freedom. He had been a slave to one Woods, who agreed to let Edwards have him for four years, after which he was to be free. Both Woods and Edwards made parol declarations to this effect. But Edwards sold him as a slave to Beall.

No declaration or promise made to a slave, or for his benefit, can be enforced in a court of law.

Per Cur. It appears that Joseph was born a slave, and it not appearing that he was ever out of the limits of the state, there is no law by which slaves in that situation can obtain freedom, or enjoy the rights of free persons, only by deed in writing, or the last will and testament of the owner, duly authenticated and recorded; but no such deed, or will, or certificate of freedom, in favor of Joseph, was produced at the trial. It is, therefore, clear, that no declaration or promise made to the slave in this state, or for his benefit by the owner, or any other person, can be enforced by a court either of law or equity. And see *Will v. Thompson*, in a note at the end of the case, where it was held, that where a purchaser in writing contracted with the seller to manumit the slave at a specified time, is not a ground for a suit at common law; but equity will enforce the contract, and give damages for the detention of the negro.

contra.
When a slave is sold for a term of years, and it is agreed between the purchaser and seller that at the end of seven years the purchaser shall manumit him, and he does so, the slave is free.

3.

NEGRO CASE V. HOWARD. June T. 1808. 2 Har. & Johns. Rep. 323.

Held by the court, *Tilghman, Polk, and Buchanan, J's.*, that where a slave was sold for a term of seven years, with an agreement between the vendor and vendee, that at the end of the seven years, the vendee should manumit him, which the vendee accordingly did, the slave was entitled under the deed of manumission of the vendee to his freedom.

4.

CUFFY V. CASTILLON. May T. 1818. 5 Martin's Louisiana Rep. 494.

A master who has agreed to free his slave for a fixed price cannot be compelled to free him after he has received a partial payment only.

Mathews, J., delivered the opinion of the court. The plaintiff, and appellant, claims her freedom, and that of her children, under a contract between her former master and Cuffy, a freeman, her father. A copy of the contract comes up with the record, as well as the proceedings, which took place in a Spanish tribunal on that contract, by which it appears, that a judgment was rendered, fixing the value of each slave who was to be manumitted, under the stipulations in the contract, and imputing a payment of 310 dollars to the benefit of one of them. By what rule of law, or principle of justice, the Spanish tribunal acted in its decision, it is useless to inquire. The matter must be considered as a *res judicata*, and it is of little importance in deciding the cause, as it is now placed before this court. The expressions of the contract itself show clearly, that Andrew Almonaster, the defendant's first husband, and former master of the plaintiff, bound himself to liberate the slaves mentioned therein, only on the condition of receiving 3,400 dollars, the price of their liberty, stipulated between him and Cuffy. It does not appear that the sum, or any part of it, was paid to him or his representatives, except 310 dollars, which were imputed on the price of *John Baptist*, one of the four slaves named in the contract, by the judgment of the Spanish tribunal; from which no appeal appears to have been taken, and which fixes and determines the appropriation of that sum. But even that sum, were it now to be considered as a general payment on the contract for all the slaves named in it, could not avail the present plaintiff. Her counsel relies much on principles of the Roman law; *quoties dubia libertatis interpretatio est.* ff. 50. 17, 20., and the law

de servo suis nummis empti, 40. 1. 40., in which, among other things, it is declared, §. 10., that, although the whole price of his freedom should not be paid by the slave, nevertheless he acquires it, if the deficiency be afterwards supplied by his labor, or if he should acquire it by his industry. As to the rule requiring the interpretation, in doubtful cases, to be in favor of freedom, it is sufficient to observe, that no one rule of interpretation in law or contracts ought ever to be considered of so much consequence, as to exclude the operation of others, equally founded in justice and common sense. Freedom must not be so favored by interpretation, as to depart entirely from the intention of the contracting parties, apparent on the contract itself. The law which authorizes the *residue* of the price to be supplied by the labor of the person claiming his freedom, as purchased with his own money, or by the circumstance of acquiring property, is, in our opinion, (and as insisted on by the counsel of the defendant,) applicable only to such persons as are made free *instantly*, on condition of paying a certain sum *in futuro*. In such a case, when a part of the price of the person is paid, and the freedman continues to labor for his former master, the value of his labor may be fairly imputed as a payment; or if he be suffered to act as a free person, and acquire property, he may be compelled, by legal proceedings, to complete the payment of the price of his freedom. But, in the case under consideration, the master contracted to give the deed of emancipation of the children of Cuffy, when the latter should have satisfied and paid him 2,400 dollars. This mode of expression demonstrates the intention of the master to liberate them *in futuro*, after the fulfilment of the condition on which alone they were to be freed, viz. the complete payment of the price of their freedom. On tendering the full amount of the sum for which he promised to give them their freedom, (at any time perhaps,) they would be entitled to demand their freedom. But, without payment, or an offer to pay, they surely can claim no benefit under the contract on which they rely. This opinion we believe to be in conformity with every just rule for the interpretation of contracts. It is supported by the authority to which the plaintiff's counsel has resorted, ff. 40. 7., *de statu liberis*, in the fifth paragraph of the third law which declares, that the *statu liber* must fulfil the condition on which he is to be entitled to his freedom, provided he be not hindered, and the condition be possible. It is laid down, that if the condition on which the slave is to be set

free, be the payment of a certain sum to the heir of the master, and he does not pay the whole, he shall not obtain his liberty. *Si decem jussus dare et liber esse, quinque det; non pervenit at libertatem, nisi totum det.* Judgment affirmed.

5.

VICTOIRE v. DUSSUAU. March T. 1816. 4 Martin's Louisiana Rep. 212.

Parol evidence of an agreement for the freedom of a slave is inadmissible.

Per Cur. Mathews, J. In the course of the trial of this cause in the court below, the plaintiff, here the appellant, offered parol testimony to prove a contract between the defendant and appellee and herself, whereby the latter, who holds her in slavery, agreed to emancipate her on condition of obtaining the reimbursement of the price which she had paid for her. This testimony being rejected by the parish judge, a bill of exceptions was taken to his opinion, on which alone the case comes up before us. The right of the plaintiff to maintain an action for her emancipation and freedom, on this contract, is unequivocally declared. 3 Part. 2. 8. And according to the general provisions of the Spanish law, such a contract may be supported on, and proven by, oral testimony. We are, however, of opinion, that the latter laws are virtually repealed by the civil code. Slaves are incapable of making any contract for themselves, except for their freedom—an exception to the general rule allowed in favor of liberty; and as, in this respect, they assume, in some degree, the standing and condition of free persons, the rules of law which direct and govern the contracts of the latter, must be applicable to those of the former, where the object of the agreement is the same. Now, according to our civil code, every covenant tending to dispose by a gratuitous or incumbered title of any immovable property must be reduced to writing, and in case the existence of such covenant should be disputed, no parol evidence shall be admitted to prove it. *Code Civil*, 310. art. 241. This principle we find recognized in the same authority, when it comes to treat of the transfer of title to immovable property and slaves, by sale, or exchange. *Id.* 344. art. 2. It is therefore clear, that between free persons no valid or binding contract can be made so as to alter the title to slaves, unless it be in writing. And, if we are correct in the position above taken, that the same rules must govern in covenants to which slaves are allowed to become parties, it is equally clear, that parol evidence ought not to be admitted to establish the existence of the contract on which the plaintiff, and

appellant, founds her action ; because it tends to dispose of a slave. The judge of the parish court acted correctly in rejecting the parol evidence. Judgment affirmed.

(D.) BY THE EFFECT OF FOREIGN LAWS.

1.

LUNSFORD v. COQUILLON. May T. 1824. 14 Martin's Louisiana Rep. 401.

Per Cur. Martin, J. The plaintiff alleges she is a free woman, and the defendant wrongfully detains her in slavery. The issue, *liber vel non*, has been found in her favor, and the defendant appealed. She does not pretend that she was born free ; and it is admitted, that if she still be a slave, the defendant derives a title to her immediately from a person who was once her owner. But she alleges, that some years ago her then owner removed from Kentucky into Ohio, with the intention of residing there, taking her thither as a part of his family. That the constitution of Ohio provides, that "there shall be neither slavery nor involuntary servitude in the state ;" that she resided for several years in this man's family, in Ohio, continuing to serve him as before ; that, having made an attempt to assert her freedom, he defeated it by her forcible removal into Kentucky ; from whence she was brought back into Ohio, and afterwards into Louisiana. Her counsel urges that, as the constitution of Ohio does not allow slavery in the state, her emancipation or freedom was the inevitable and immediate consequence of the act of her former owner, in removing her, with the intention of residing in Ohio ; that, as she was a free woman there, she must be held so every where. The relation of owner and slave is, in the states of this union, in which it has a legal existence, a creature of the municipal law. Although, perhaps, in none of them a statute introducing it as to the blacks can be produced, it is believed that, in all, statutes were passed for regulating and dissolving it. The issue of a female slave is held to be born in the condition of the mother, the maxim of the Roman law, *partus sequitur ventrem*, being universally recognized. Indians taken captives in war, have been declared slaves, and the absolute property of the captor ; and a kind of temporary slavery has been made the doom of persons of color guilty of certain breaches of the

If the owner of a slave remove her from Kentucky to Ohio, *animus morandi*, she becomes free, *ipso facto*.

law. 2 Martin's Revisal of N. C. Laws ; 2 Martin's Digest of the Laws of Louisiana, 172. In most of the states recognizing slavery, laws have been passed to authorize, regulate, or check the emancipation of slaves. In some, as in Pennsylvania, laws have been made to abolish or modify slavery. The right of a state to pass laws dissolving the relation of master and servant, is recognized in the constitution of the United States, by a very forcible implication. This instrument declares, that no person held to service of labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation thereof, be discharged from such service or labor. Hence the implication is strong, that such persons, who do not escape, but whose owners voluntarily bring, may be discharged by the laws or regulations of the state in which they are so brought. For if this could not be, to what use would be the prohibition ? The counsel for the plaintiff, presuming that he has thus shown the right of states to dissolve the relation of owner and slave in other cases than the excepted one, contends, that the state of Ohio having forbidden its existence, the relation is, *ipso facto*, dissolved, when owners of slaves, in other states, come with such slaves into Ohio, with the intention of residing there. The words used by the framers of the constitution being the most forcible ones to express the idea that *every one in the state should be free*. It is argued, that if the relation of owner and slave is a creature of the municipal law, in these states, and may be regulated, modified, and dissolved by it, it follows, that when dissolved, according to the law of the domicile of the owner and of the slave who lives with him, (if the slave can have a domicile other than his owner's,) it must be considered every where, as having legally ceased to exist.

The converse of the proposition is certainly true. An Indian captive reduced to slavery under the laws of North Carolina, and a colored man under those of Louisiana, would be considered as the property of the captor or purchaser, in every state in the Union in which the slavery of Indians or negroes is allowed. So, slaves legally emancipated, according to the law of the domicile of the owner, would be supported in the enjoyment of their freedom. So, the incipient right to freedom of the issue of a female slave, registered according to the laws of Pennsylvania, would prevail in Kentucky, notwithstanding her removal to the latter state. *Bibb Qualitates personales certo loco alicui jure impressas ubique circumferi*

et personam comitari, cum hoc effectu ut ubivis locorum, eo jure quales personæ alibi gauderint vel subjecti sunt fruenter et subjiciantur, 2 Hiberus, 541. de Confl. Legum.

But the plaintiff's counsel says, the constitution of Ohio did not, on her removal, *ipso facto*, vest freedom on her, but conferred only the right of procuring it to be decreed by the tribunals of that state. That the provision, being a *penal* one, ought not to be enforced by the courts of other states. That the acquisition of freedom by the plaintiff, or what is the same thing, the forfeiture of the owner's right, cannot be incidentally pronounced, and cannot be decreed, except by a judgment in a suit against him, whose right is to be destroyed. Had the framers of the constitution of Ohio intended that slavery might exist in that state, in the persons who might be removed thither, until certain formalities should be complied with, they would have used different words. It would be idle for a court to decree, that thereafter slavery cannot exist in A. B., when the constitution proclaims that it exists in no one in the state. The article of the constitution is not a *penal* one, and denounces no forfeiture. Penalty and forfeiture essentially presuppose the omission of an act commanded, or the commission of one forbidden. The article does neither command nor forbid any act. It warns owners of slaves in other states, removing into Ohio, to sell or leave them behind, if they are not intended to be emancipated, and promises emancipation to all slaves brought in, or permitted to come in, on their master's entering the state with the view of fixing their domicil in Ohio. A penalty or forfeiture cannot be decreed without a prosecution and conviction, and must ordinarily be sued for within a given period. In almost every case of removal, the consequences of it are acknowledged and submitted to. How then is the new citizen of Ohio to be prosecuted, and of what is he to be convicted? Should a citizen of a neighboring state, where emancipation may be forbidden, restricted, or attended with expense, consent to allow a slave to go and enjoy his freedom in Ohio, is the grateful slave to arrest and prosecute his former owner, the first time he accidentally comes to Cincinnati? and if he never comes, and as no forfeiture can be decreed without the defendant being brought in, or at least cited, will slavery, in spite of the constitution, exist in Ohio, until the former owner comes into that state, and be served with process? If the freedom of the former slave shall be a forfeiture, which is to be decreed in an action, and the owner die before he is sued, so that the pretended offence die with

him, will slavery exist for ever in Ohio? We conclude, that the constitution of the state of Ohio emancipates *ipso facto* such slaves whose owners remove them into that state, with the intention of residing there.

That the plaintiff having been voluntarily removed into the state by her then owner, the latter submitted himself, with every member of his family, white and black, and every part of the property brought with him, to the operations of the constitution and laws of the state; and that, as according to them, slavery could not exist in his house. Slavery did not exist there, and the plaintiff was, accordingly, as effectually emancipated by the operation of the constitution, as if by the act and deed of her former owner; that she could not be free in one state, and a slave in another; that her freedom was not impaired by his forcibly removing her into Kentucky, to defeat her attempt to assert her freedom; nor by her subsequent removal, voluntary or forced, into this state. This opinion is in conformity with that of the court of appeals of Virginia. *Bibb.* 2 Marshall's Rep. 467. It can work injury to no one; for the principle acts only on the willing, and *volenti non fit injuria*. The plaintiff's counsel has laid great stress on the former owner of the plaintiff removing into Ohio, with the intention of settling, and it is this circumstance which governs the case. In the decision of the court of appeals of Kentucky, it is expressly said, that slaves attending their master's sojourning in, or travelling to Ohio, are not thereby emancipated. As this point has no bearing on the present case, it is useless to consider it. Judgment affirmed, with costs.

2.

STEWART v. OAKES. Dec. T. 1813. 5 Har. & Johns. Rep. 107. (note.)

Different
periods
constitu-
ting one
year.

The court held, that a slave carried at different periods to Virginia by his owner residing in this state, and employed working at his stone quarries, the several periods amounting in the whole to one year, such slave is entitled to his freedom under the law of Virginia of the 17th of Dec, 1792, ch. 103. §. 2.

3.

RANKIN v. LYDIA. Fall. T. 1820. 2 Marshall's Rep. 467.

Held by the court, *Mills, J.*, that where a master took his slave in the state of Indiana, where slavery does not exist, and registered her, under the act of the 17th of Sept. 1807, which authorized the introduction of negroes and mulattoes, (but not slaves,) and made valid a binding or compact to serve for a period of years; on her return to Kentucky, on a question of freedom or slavery, the slave was free. The master agreeing to accept a temporary servitude of his slave was an admission of freedom, which he is estopped to deny, or any other person claiming under him.

Taking a slave into a state where slavery is not permitted.

4.

HUNTER, pauper, v. FULCHER. March T. 1829. 1 Leigh's Rep. 172.; S. P. GRIFFITH v. FANNY, Gilm. Rep. 143.; MURRAY v. M'CARTY, 2 Munf. Rep. 393.; RANKIN v. LYDIA, 2 Marshall's Rep. 467.

This was a suit for freedom brought in the hustings court of Richmond. 5 Rand's Rep. 126. It appeared the master took his slave from Virginia to Maryland, and resided there with him for the period of twelve years, and then returned with him to Virginia. By the statute of Maryland, all slaves brought into that state to reside are declared free; which statute was in force all the time of the slave's being in Virginia. The question was, whether the slave was free or not. The hustings court decided he was not entitled to his freedom. The slave appealed to the circuit court, which affirmed the judgment of the hustings, and the slave appealed to this court.

Where a slave was taken from Virginia with his master into another state, where the law declared that slaves bro't in to reside should be free, and resided with him for a period of years, on being taken back the court held he was free.

The court observed, they saw no objection in principle to giving full effect here to the laws of Maryland operating upon the rights of persons who were subjected to them.

Per Green, J. The law of Maryland having enacted, that slaves carried into that state for sale, or to reside, shall be free, and the owner of the slave here having carried him to Maryland, and resided there with him for twelve years, thus becoming himself a citizen of Maryland, and voluntarily subjecting himself and the slave to the operation of her laws, I think the right to freedom vested, and could not be divested by the bringing him back afterwards to Virginia. Judgment reversed.

5.

HARVY and others v. DECKER and HOPKINS. June T. 1818.
Walker's Mississippi Rep. 36.

Per Cur. This is a motion for a new trial, and the reasons assigned embrace the whole grounds of the case. Without making points, upon which the court below have unanimously agreed, but touching them incidentally, I shall confine myself to such as have occasioned a difference of opinion. I will, in this place, premise, that it is, and always will be, a source of regret to me when I am so unfortunate as to differ from my brethren of the bench, and it is particularly to be regretted, when the importance of the question is great, and when unanimity is so desirable, both to the bench and to the parties whose interest is the immediate subject of adjudication. But as a judge, I have a duty paramount to all these considerations, which must prevail, however unpleasant to my own feeling, and whatever may be the consequences to others. The facts in this case are not controverted: that the three negroes were slaves in Virginia; that in 1784 they were taken by John Decker to the neighborhood of Vincennes; that they remained there from that time until the month of July, 1816, that the ordinance of congress passed in the month of July in the year 1787, and the constitution of the state of Indiana was adopted on the 29th of June, 1816. These are the material facts, but the law arising out of the ordinance treaty of cession of Virginia to the United States of that district of country, and the constitution, is controverted. To clear away the difficulties arising from extraneous matter, and to place the grounds of this opinion plainly before the court, a short history of the country will be necessary. The country was within the chartered limits of Virginia, but from the year —, until the peace of 1763, it was subject to and claimed by France. By the peace of '63, it was ceded to Great Britain. It will appear by reference to the proclamation of Gen. Gage, in 1775, and to the acts of Col. Wilkins, in granting lands as governor of Illinois, that it was under a government distinct and separate from the then colony of Virginia. During our revolutionary war, it was conquered by the arms of Virginia; but there has been exhibited no evidence to show that the laws of Virginia were ever extended to that country after its conquest, or that Great Britain, after the treaty of '63, by which she obtained it, ever changed the laws then existing in the province. I have carefully examined the acts of Virginia, and can find no provision extending its laws to

The treaty of cession by Virginia to the United States, which guarantees to the inhabitants of the Northwest Territory their titles, rights, and liberties, does not render void that article of the ordinance of congress of 1787 which prohibits slavery in that territory. Any state may, by its constitution, prohibit slavery within its limits. When not restrained by the constitution, slaves within the limits of the Northwest Territory became freemen, by virtue of the ordinance of 1787, and can assert their claims to freedom in the courts of this state.

that district of country. I think, then, that it is undeniable, that the laws as they existed while it was a province of France, were the municipal laws of the country. This opinion is supported by the treaty of cession from Virginia to the United States, and also by the ordinance of 1787. The treaty of cession provides, that the French and Canadian inhabitants, and other settlers who profess themselves citizens of Virginia, shall have their possession and titles confirmed, and be protected in the enjoyment of their rights and liberties. We find that until the governor and judges shall adopt laws, the manner of passing and transferring estates and sale of personal property declared; saving to the French and Canadian inhabitants, and other settlers of the Kaskaskias and Vincennes, and other villages, the laws and customs now in force among them relative to the descent and conveyance of property. If the laws of Virginia were extended to them, there could exist no possible necessity of making the saving clause.

The question that necessarily arises is, in what relation did they stand to Virginia? As a province, must be the answer; and in this condition they passed to the United States under the treaty of cession of Virginia. It is an unquestionable rule, that the laws equally effect all persons and all property within the territorial limits of a state or province, unless there be some special reservation. Wherever a person lives, he puts himself, for the time, under the protection of the laws of the place; and John Decker had no privilege distinct from the French and Canadian inhabitants. In the treaty of cession they were not parties, but the subject in part of the treaty. The clause guarantying their titles, possessions, rights and liberties, was a matter of favor, and designed for their exclusive benefit. They not being in a situation to contract for themselves, the sovereign made the contract. The cession of Louisiana is an apt illustration. The rights and privileges they possess arise from the treaty of cession. That the sovereign of a conquered country can make such changes, alterations, and dispositions, as he may think proper, is a principle too well established to require the citation of authorities to support. But it is said, that a treaty is a sacred instrument, and cannot be violated. This is admitted; but the question then arises, is the clause in the ordinance prohibiting slavery, or involuntary servitude, a violation of the treaty of cession? Before an act of congress is declared inoperative, for violating fundamental principles, the court ought to

be fully and completely satisfied. I have endeavored to show in what condition these people were after the conquest of Virginia, what rights they possessed, and the rights they acquired under the treaty of cession. From the facts, authorities, and reasons advanced, these consequences result, that, as conquered countries, they were subject to such laws as the conquerors chose to impose ; that the legislature of Virginia, not making any change in their laws, the ancient laws remained in full force, and that the " titles, possessions, rights and liberties," guaranteed, were those they enjoyed prior to the conquest, the "*lex loci*" not as citizens of Virginia, but as a provincial appendage. We will now come to the ordinance, and the sixth article of the compact, which declares, " there shall be neither slavery nor involuntary servitude in said territory, otherwise than for the punishment of crimes, whereof the party shall be duly convicted." Preceding the sixth article, it is ordained and declared, that the six articles shall be considered as articles of compact, between the original states and the people and states in said territory, and forever remain unalterable, unless by common consent. The legislature of Virginia assigns, as one of the reasons for the alteration made in the treaty of cession, that it was to ratify and confirm the said article of compact between the original states and the people and states of the said territory. That the sovereign may contract with the people, is an acknowledged principle ; and the only question is, whether the compact shall be obligatory on the parties. That the people of the territory were parties is evident ; that their condition was changed from absolute subjection, to the condition of freemen, is equally clear.

Then the question is, did not congress give a valuable consideration for the concession by the people in the sixth article, the privileges and immunities of freemen, for the freedom of their slaves ; and have not the petitioners a right to claim the benefit of this article ? But it is contended, that the treaty of cession is obligatory and binding, and not to be altered, not even by the people themselves.

Let us for a moment examine the nature and quality of the provision guarantying their titles and possessions, rights, and liberties ; does it relate to their political or civil condition ? If the latter, is it not merely a personal benefit ? And, as such, they have a right to dispose of it. To say they could not dispose of their property,

would be denying them a privilege inseparable from property and its dominion. If they could dispose of it individually, what reason can be offered why they should be debarred, in their character of a people, from contracting with their government for the freedom of American citizens? To my mind there can be none. But it is said to be a fair construction of that clause in the ordinance, that, notwithstanding the express words that there shall not be slavery or involuntary servitude except for crimes, and after conviction, yet the petitioners must be slaves, by the potency of the clause in the treaty of cession "that their titles and possessions, rights and liberties, shall be secured by them." For my own part, viewing as I do the clause of the ordinance as a compact between the original states and the people and states of said territory, it is too plain to require construction. In doubtful matters, we resort to construction; but to give it the construction contended for by the defendant's counsel would contradict what it so clearly declares. The ordinance provides, that there shall be neither slavery nor involuntary servitude, otherwise than for the punishment of crimes, excluding all kinds of servitude, except that which follows a conviction. But according to the construction of the defendant's counsel, those who were slaves at the passing of the ordinance must continue in the same situation. Can this construction be correct? Would it not defeat the great object of the general government? It is obvious it would, and it is inadmissible upon every principle of legal construction. Considering the six articles of compact equally obligatory and binding, made upon sufficient consideration, all the objection, as to the want of power in congress to make the compact with the people of the said territory, must vanish. Another point in this case was relied on, namely: that if the petitioners were not freed by the 6th article of the ordinance, they became so by the adoption of the constitution of Indiana. Even the power of the people, in their sovereign capacity, is denied, to effect a general emancipation. To test this, we must first inquire into the source of sovereignty, as understood in these United States, to reside in the people. In all governments whatsoever there must be, of necessity, and in the nature of things, a supreme, irresistible, absolute, and uncontrolled authority, in which the "*jura summi imperii*," or the rights of sovereignty reside, and when we speak of sovereignty in this sense, it is in contradistinction of the powers given under a constitution, or the powers of a limited government, that a constitution emanates from, and is a

part of that sovereignty in its most extensive sense, as residing in the people, is universally acknowledged by all those best acquainted with the theory and principles of our government. That the same power that creates, can change, alter, or destroy, is a consequence too clear to require it to be supported by proof. The people restrain the power under a delegated authority, but put no restraint upon themselves. The acts of the supreme power, though contrary to natural rights, are nevertheless binding.

In every case under the social compact there must be an inequality to destroy the validity of the surrender. Among an ignorant and uninstructed people, what are the rights surrendered? Rousseau, in his *Social Compact*, informs us, it is the total alienation of every individual with all his rights and privileges to the whole community, and assigns the reasons, as one gives himself up entirely, and without reserve, and all are in the same circumstances, so no one can be interested in rendering burthensome their common connection. And again, he says, as the surrender is made without restraint, no one has any thing to retain, if any one had a right distinct from another, which he pretended had not been surrendered, each individual might question the acts of the social compact; and if this was permitted, it would destroy itself, as there would be no common umpire to appeal to: a state of nature would exist, and the social compact be a splendid bauble. Assume the principles laid down as acknowledged, and they do appear to me to be so well established by all jurists and constitutional writers, as merely to require them to be stated, in order to ensure their admission. The question then resolves itself into this: What were the rights delegated by the people to the convention, or what was the trust or power of that convention? Was all, or only a part of the sovereignty committed to them? and if a part, where are the restrictions to be found? The ordinance only restricts; and these restrictions are to be found only in the articles of compact, and relate simply to the nature of the government to be formed. And that the principles are not inconsistent with the articles of compact, and one of those very articles is recognized, and made a part of their constitution, under which the petitioners claim their freedom. And how is this claim to be got over? Why, we are told, it is inconsistent with the constitution of the United States, and the treaty of cession from Virginia. The answer to the latter will be found in the opinion given on the first point; and the very reasons the court have urged, as to the defendants not having been parties to the

ordinance, apply in fact to the constitution of the United States ; and, as I have already shown, they were parties to the six articles of compact. The constitution of the United States has nothing to do with this question ; and before it could apply, Indiana was received as one of the members of the Union ; and this was subsequent, and grew out of the adoption of their constitution. If, then, I am correct in opinion, that the clause of the constitution of the United States is inapplicable, (and there is nothing in the treaty of compact, contained in the ordinance, inhibiting the convention the power to free the petitioner,) by what right are they held ? All those principles assumed must be fallacious. Freedom was extended to the slaves in Massachusetts by their constitution. I have it from high authority, and I have examined their statutes, and can find no general statute of emancipation. And so guarded was our convention upon this subject, that they inhibited the legislature from the exercise of the power Pennsylvania, Delaware, New-Jersey, New-York, and the New England States, Massachusetts excepted, have legislated on this subject ; and that it is a proper subject of legislative interference, when not restrained by the constitution, is evident by the caution of our convention, and the exercise of the power by the several legislatures before mentioned.

But we are told that the treaty of cession intervenes. If old Decker was not a party to the articles of compact, it cannot be denied but that he was, or those who claim under him were parties to the constitution of Indiana. If he was, how can he claim a particular exemption from the operation of the constitution, according to the principles of the social compact before laid down ? And if inequality was to exempt, would it not tend to destroy it ? Does not the first article of the constitution declare the condition of the people of Indiana free ? and this condition, by the last section of the first article, is likewise declared to be out of the control of government, or to be a right reserved to the people. Under a similar provision, slavery was abolished in Massachusetts ; and by art. 9. sec. 7. of the constitution, the sixth section of the ordinance is adopted ; and in art. 9. sec. 4. all laws conflicting with the provisions of the constitution are repealed. Can it be that slavery exists in Indiana ? If it does, language loses its force, and a constitution intended to protect rights, would be illusory and insecure indeed. If the language is plain, saying there shall be neither

slavery nor involuntary servitude, does it comport with the constitution to say *there shall* be slavery? This dilemma cannot be got over by those who give it a construction that would make the petitioners slaves. Why resort to construction in a case so plain? Do the rules of construing statutes apply to a constitution? Where does the power reside of restraining the people in their sovereign capacity? Is there any such power recognized? Are we not told that the parliament of England can pass any law, however it may violate first principles, and the courts would be bound to enforce it. It is in vain to attempt to bind that which is in itself illimitable, irresistible, and supreme. But it is contended, that the provisions of the constitution admit of a different construction; that it is prospective; and to give it the meaning its language imports, would violate vested rights. What are these vested rights? Are they derived from nature, or from the municipal law? Slavery is condemned by reason and the laws of nature. It exists, and can only exist, through municipal regulations, and in matters of doubt, is it not an unquestioned rule, that courts must lean *in favorem vite et libertatis*? Admitting it was a doubtful point, whether the constitution was to be considered prospective in its operation or not, the defendants say—you take from us a vested right arising from municipal law. The petitioners say, you would deprive us of a natural right guarantied by the ordinance and constitution. How should the court decide, if construction was really to determine it? I presume it would be in favor of liberty. From the view I have taken I am satisfied, that the petitioners are entitled to have the verdict confirmed, and the motion for a new trial overruled.

6.

SPOTTS v. GILLASPIE. Nov. T. 1828. 6 Randolph's Rep-566.

The power of state laws to change the condition of persons held in slavery under them cannot be doubted.

Susanna Gillaspie sued *in forma pauperis* to recover her freedom of Jacob Spotts, who held her in slavery.

It appeared that one Gilchrist held possession of a negro woman called Hannah, in Lancaster, Pennsylvania, as a slave, and in April 1782, devised the said Hannah to his son-in-law James Robinson, who lived in Augusta county, Virginia. In 1786 Hannah, the slave, had born of her body a female negro in the state of Pennsylvania, named Susanna, the plaintiff; and when about six weeks old, the said Susanna, with her mother, was taken by Robertson to Vir-

ginia, and sold to Spotts, the defendant. The act of Pennsylvania for the gradual abolition of slavery was passed in 1780, and abolished the slavery of children born after the act. And the question was, whether Susannah was entitled to her freedom in Virginia. The superior court gave judgment for the plaintiff, and the defendant appealed.

Per Cur. We think the plaintiff is entitled to her freedom, and the judgment of the superior court ought to be affirmed. The case appears to be clearly embraced by the law of Pennsylvania. It includes all children born of slaves after the passage thereof, to whomsoever their mothers might belong, whether citizens of Pennsylvania or other states. The power of the state of Pennsylvania to change the condition of persons held under its laws (and no other) in slavery cannot be questioned, especially if they were not then the property of a citizen of another state, which is not the case before the court. When the act was passed, Gilchrist's property in Hannah, and her condition as a slave, were subject to the laws of Pennsylvania. It might, and did change the character of his property in her, and in so far, her condition as a slave. Before the act of 1780, he held an absolute property in her and her children then to be born. Afterwards, though his property in her was, as to her services, the same, her condition was so changed that she could not be the mother of a slave in Pennsylvania, and his property to that extent was changed. The law of Pennsylvania was, as regarded his property in her and her condition, executed. His will could not effect this state of things. He might pass his qualified property in her, and her future offspring, according to the provisions of the act, but it could not alter the then condition, either of Hannah or her offspring born afterwards: they remained as before. Susanna, the plaintiff, was born under its operation in Pennsylvania: by it, though born of a slave, she was free; and in this aspect of the case, the court is not called on to execute the law of Pennsylvania, but the law of Virginia, which does not now, and did not then permit a person free in Pennsylvania to be held in slavery here. Judgment affirmed.

7.

LOUIS V. CABARRUS et al. Aug. T. 1834. 7 Louisiana Rep. 170.

The plaintiff claimed to be a freeman on the ground that he resided in the state of Ohio two or three years. He offered evi-

Not where the consent of the master is not shown.

dence of that fact, by showing that he was seen there by two or three persons. The jury found the plaintiff a freeman.

On the appeal the court reversed the judgment below, on the ground that proof of the residence of a slave in a free state, the constitution of which forbids slavery during the space of two or three years, unconnected with any other proof, is insufficient in law to entitle such slave to freedom ; and they observed farther, that a residence of the slave contrary to will, or without the consent of the owner, does not deprive the owner of his right to his property.

8.

NEGRO DAVID v. PORTER. Oct. T. 1799. 4 Har. & M'Hen. Rep. 418.

But not
where the
hirer is an
infant.

By the testimony it appeared, that the petitioner was the property of Richard Coale, who resided in Frederick county in this state, in the year 1788. That the said Coale hired the petitioner to one M'Lean, who resided in the state of Pennsylvania, and was there with the petitioner in 1788. That the agreement was executed between the said Coale and M'Lean for the hire of the petitioner ; that the petitioner is now in the possession, and claimed by the defendant, who resides in Frederick county in this state.

The general court gave judgment that the petitioner is free, and that he be discharged. But see Porter v. Butler, 3 Har. & M'Hen. Rep. 168., where the court held, a slave is not free under the laws of Pennsylvania if hired to a resident of that state by an inhabitant of this state who is an infant at the time of hiring.

9

MARIE LOUISE v. MARIOT et al. May T. 1836. 8 Louisiana Rep. 475.

The operation of foreign laws upon slavery is immediate and perfect: the party cannot again be reduced to slavery.

In a suit for freedom it appeared, that the defendants took the complainant to France, where slavery is not tolerated ; and on their return still held her as a slave. It was contended, that sojourning in the kingdom of France did not emancipate the slave ; and 2 Martin's N. S. 401., and 2 Marshall's Rep. 476., were cited.

Per Cur. Mathews, J. The question is, whether the fact of her having been taken to that kingdom by her owners, where slavery or involuntary servitude is not tolerated, operated upon the condition of the slave so as to produce an immediate emancipation. That such is the benign and liberal effect of the laws and customs of that state, is proven by two witnesses of unimpeachable credi-

bility. This fact was submitted to the consideration of the jury, who tried the cause under the charge of the judge, which we consider to be correct, and was found in favor of the party whose liberty is claimed. Being free for one moment in France, it was not in the power of her former owner to reduce her again to slavery.

10.

FORSYTH et al. v. NASH. June T. 1816. 4 Martin's Louisiana Rep. 385.

Per Cur. Martin, J. The plaintiffs in this case claim the defendant, a negro man, as their slave. It therefore behoves them to show slavery in him and property in them. The evidence adduced for this purpose is, 1st. A bill of sale by which the defendant was sold to them "to have and to hold the said negro man, and to dispose of him as they shall think proper." This instrument, bearing date the 5th of September, 1803, was executed at Detroit, in the territory of Michigan, was there recorded, and is duly authenticated. 2d. The deposition of David Delauney, who swears he knows a Mr. Forsyth, at St. Louis, whose christian name he is ignorant of, but knows not the other plaintiff; that there was at Detroit a mercantile house, under the firm of Kinsey & Forsyth, but he is ignorant whether Mr. Forsyth of St. Louis be one of that house; that he saw the defendant at Mr. Forsyth's in St. Louis, but does not know to whom he belonged. 3d. The deposition of Nicholas Girod, who swears, that while he was mayor of New Orleans the defendant was brought before him, and confessed he was a runaway, and belonged to some person the name of whom the witness does not recollect, who had promised him his freedom. 4th. The deposition of A. B. Duchouquet, of St. Louis, who swore he never saw the defendant in the possession of the plaintiffs, because the plaintiffs lived at Peoria, in the Illinois territory; that the plaintiff, Forsyth, employed him in 1813, to stop the defendant; that he took him up in New Orleans, and brought him before the mayor, where he confessed he had ran away from the plaintiffs, and did not like to return to them on account of a wife and children he had in New Orleans. 5th. The deposition of Pierre Le Vasseur, who knew the defendant in Peoria, in the Illinois territory, about ten years ago. He was known and reputed to be a slave; the witness knew him in the possession of Forsyth for four years. He ran away from Peoria, about six years ago.

A negro will be presumed free though purchased as a slave, if the purchase was made in a country in which slavery is not tolerated, unless it be shown that he was before in one in which it is.

The witness some time after met him at Marpertues, in the Illinois territory, and the defendant said he had ran away from his master and was going to St. Louis. On these facts, the counsel contends, that the slavery of the defendant, and the property of the plaintiffs, are fully proven.

1st. The evidence of *slavery* resulting from the color of the defendant. *Adelle v. Beauregard*, 1 Martin's Rep. 183. ; from his declarations that he had a *master* ; that he *belonged* to a man who had promised him his *freedom* ; from his attempt to justify his unwillingness to return ; by the circumstances of his having a wife and children in New Orleans, thereby tacitly admitting the obligation he was under of returning to the plaintiffs.

2d. The *property* of the plaintiffs is said to be proven by the bill of sale.

The defendant's counsel shows, that in the territories of Michigan and the Illinois, the only place except New-Orleans and St. Louis, which the defendant appears to have inhabited, *slavery does not exist* ; that it is *forbidden by law*. The ordinance of congress of the year 1797, providing that "there shall be neither slavery nor involuntary servitude in the said territory, otherwise than for the punishment of crimes, whereof the party shall have been convicted. Provided, that any person *escaping into the same*, from whom labor or service is lawfully claimed in any one of the original states, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her services aforesaid." Hence, in the opinion of the counsel, a presumption arises, that the defendant is free, which overweighs the contrary presumption which arises from the *color*. It is further contended, that as the bill of sale could convey no title, unless the defendant had been *duly convicted of a crime*, or in case he owed services in one of the original states, and *had escaped* into the Michigan territory, the plaintiffs are bound to bring the defendant within one of these two cases ; that if the defendant was convicted of a crime, by which he became bound to involuntary service, the record of this conviction ought to be produced ; so ought, in the other case, evidence of the duty of involuntary service in one of the original states, and of *escape into the territory* ; that the apparent unlawfulness of the authority exercised by the plaintiffs over the defendant, to which he may have submitted from his ignorance of his right, or of the means of asserting it, is not repelled by his admission that he had a *master*, that he *belonged* to a person who had promised him his *freedom*. For while it appears

that the plaintiffs *de facto*, though not *de jure*, kept the defendant for a number of years in servitude, it cannot seem extraordinary that he should refer to them by the appellation of his *masters*; and the alleged promise of freedom may well be presumed to have been made to allure the defendant into submission. Neither is it said, can the admission of the defendant, that he *ran away*, be received as conclusive evidence of a legal obligation to stay: flight from unlawful servitude being more generally resorted to, than the bold assertion of freedom. Kept for a number of years, perhaps from his birth, in bondage, the spirit of the injured negro is said to have been borne down by the influence which long exerted mastery creates. We are of opinion, that as the case affords no evidence of any residence of the defendant in any country in which slavery is lawful, this case must be determined by the laws of the country in which the defendant dwelt when he came to the hands of the plaintiffs; that the ordinance of 1787, having proclaimed that slavery should not exist there, unless under two exceptions, the plaintiff must bring the defendant under either of them, and having failed to do so, must have their claim rejected. Whenever a plaintiff demands, by suit, that a person whom he brings into court as a defendant, and thereby admits to be in possession of his freedom, should be declared to be his slave, he must strictly make out his case. In this, if any, *actore non probante absolvitur reus*. Here the plaintiffs have failed in a very essential point, proof of the alleged slavery of the defendant.

Their title can only have been lawful at the time the bill of sale produced was made, on two grounds: the right of the vendor, or the liability of the object of the sale, must have been absolute or qualified. *Absolute*, viz: complete ownership and slavery, in the sole case of conviction of a crime by which freedom was *forfeited*. *Qualified*, viz: the right of reclaiming and conveying the defendant out of the territory into one of the original states, in which he owed involuntary servitude or labor. This qualified right could only exist in the case of the defendant's *escape*. Now, it cannot be contended, that this qualified right only was disposed of; that which is the evident object of the sale, is the absolute right to *have and to hold during the natural life, and to dispose as they please*. The conduct of the plaintiffs towards the defendant shows, that it was this absolute right which they considered themselves as the purchasers of. This they unlawfully attempted to do, and did successfully for a number of years exercise, till the defendant sought his safety

in flight. Their title to him, if it exists, must be grounded on his conviction of a crime. Now, the evidence of this is a *matter of record*; the paper must be produced or accounted for. The parish court erred in sustaining the plaintiff's claim; its judgment is, therefore, annulled, avoided, and reversed; and this court doth order, adjudge, and decree, that there be judgment for the defendant, with costs.

11

THE STATE V. LASSELLE. July T. 1820. 1 Blackford's Indiana Rep. 60.

Slavery is entirely prohibited within the state of Indiana by the express words of the constitution.

Appeal from the Knox circuit court. Polly, a woman of color, was brought before the circuit court by Lasselle, in obedience to a writ of *habeas corpus*. He stated in his return, that he held her by purchase as his slave, she being the issue of a colored woman purchased from the Indians in the territory northwest of the river Ohio, previously to the treaty of Granville, and cession of that territory to the United States. The court below remanded the woman to the custody of Lasselle.

Per Cur. Scott, J. The question before this court is as to the legality of Lasselle's claim to hold Polly as his slave. This question has been presented before us with an elaborate research into the origin of our rights and privileges, and their progress until the formation of our state government, in 1816. On one hand, it is contended, that by the ordinance for the government of the territory northwest of the river Ohio, and by the constitution of Indiana, slavery was, and is, decidedly excluded from this state; while, on the other hand, it is insisted, that by the act of cession of the state of Virginia, and by the ordinance of 1787, the privilege of holding slaves was reserved to those settlers at Kaskaskias and, St. Vincents, and the neighboring villages, who, prior to that time, had professed to be citizens of Virginia; and that they had a vested right, which could not be divested by any provision of the constitution. In deciding this case, it is not necessary for us to recur to the earliest settlement of the country, and inquire what rights the first emigrants enjoyed, as citizens of Virginia; or what privileges were secured to them, when their connection with that state was dissolved. Whether the state of Virginia intended, by consenting to the ordinance of 1787, to emancipate the slaves on this side of the Ohio river, or whether, by the reservation alluded to, she intended to continue the privilege of holding slaves to the settlers

then in the country, is unimportant in the present case. That legislative authority, uncontrolled by any constitutional provision, could emancipate slaves, will hardly be denied. This has been done in several of the states, and no doubt has been entertained, either of the power of the legislature to enact such a statute, or of the binding force and efficacy of the law when enacted. By the power of a statute an estate, may be made to cease, in the same manner as if the party possessing it were dead. A man may, by statute, be made an heir, who could not otherwise be one. The legislature have the power to change the course of descents, so as to cast an estate upon those who, otherwise, could never have taken it by inheritance. This doctrine is sanctioned by the authority of Coke, Levintz, Blackstone, Bacon, and others of the first respectability. It must be admitted, that a convention, chosen for the express purpose, and vested with full power, to form a constitution which is to define, limit, and control the powers of the legislature, as well as the other branches of the government, must possess powers, at least equal, if not paramount, to those of any ordinary legislative body. From these positions it clearly follows, that it was within the legitimate powers of the convention, in forming our constitution, to prohibit the existence of slavery in the state of Indiana. We are, then, only to look into our own constitution, to learn the nature and extent of our civil rights; and to that instrument alone we must resort for a decision of this question.

In the first article of the constitution, section 1st, it is declared, "That all men are born free and independent, and have certain natural, inherent, and unalienable rights; among which are, the enjoying and defending of life and liberty, and of acquiring, possessing, and protecting property; and pursuing and obtaining happiness and safety." Section 24th of the same article, guards against any encroachment on those rights, and provides that they shall forever remain inviolable. In the 11th article of that instrument, section 7th, it is declared, that "*There shall be neither slavery nor involuntary servitude in this state, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted.*" It is evident that, by these provisions, the framers of our constitution intended a total and entire prohibition of slavery in this state; and we can conceive of no form of words in which that intention could have been more clearly expressed. We are told that the constitution recognizes pre-existing rights, which are to continue, as if no

change had taken place in the government. But it must be recollected, that a special reservation cannot be so enlarged by construction as to defeat a general provision.

If this reservation were allowed to apply in this case, it would contradict, and totally destroy, the design and effect of this part of the constitution. And it cannot be presumed that the constitution, which is the collected voice of the citizens of Indiana, declaring their united will, would guaranty to one part of the community such privileges as would totally defeat and destroy privileges and rights guarantied to another. From these premises it follows, as an irresistible conclusion, that, under our present form of government, slavery can have no existence in the state of Indiana; and, of course, the claim of the said Lasselle cannot be supported. The judgment is reversed, with costs, and the woman discharged.

12.

GRIFFITH v. FANNY. Dec. T. 1820. Gilmer's Virginia Rep. 143.

A negro held in servitude in Ohio, under a deed executed in Virginia, to a citizen of Virginia, is entitled to freedom by the constitution of Ohio.

Fanny sued Griffith, in *forma pauperis*, for her freedom, in the superior court of law for Wood county. The defendant pleaded "not guilty," and specially that Fanny was his slave. At the trial, the jury found by a special verdict, that Fanny was the slave of one Kincheloe, until a short time before the 23d of August, 1816. Some time in that month he sold her to William Skinner, a citizen resident in the state of Ohio. In conformity with the sale, Kincheloe delivered possession to Skinner at Marietta in Ohio, and received the purchase money. Griffith was present at this sale; and on the 23d of August, 1816, Kincheloe executed a bill of sale for Fanny, to Griffith, which bill was delivered to Skinner. This bill was an absolute sale of Fanny from Kincheloe to Griffith, who was at the time, and continued to be, a citizen of Virginia. The agreement to have a bill of sale executed to Griffith, was between him and Skinner; for Kincheloe was not party to their contract, though he executed the deed. At the time of its execution, Skinner stated to Kincheloe, that he wished the bill of sale to be to Griffith, because by the laws of Ohio he could not hold a slave in his own right. Fanny was at different times seen at Skinner's residence in Ohio. She was last seen there, in the spring of 1818. About the first of October 1818, she returned to Virginia, where she was taken into the possession of Griffith, who claimed her under the bill of sale. The section of the constitution of Ohio, prohibiting involuntary

servitude, was inserted into the verdict. And upon these facts, the law of the case was submitted to the court, which gave judgment for the pauper, and Griffith appealed.

By the court. The judgment is affirmed.

13.

WILSON v. ISBELL. April T. 1805. 5 Call's Rep. 425.

In a suit for freedom, brought by Isbell, who had been a slave to one Whiting, it appeared that Whiting had moved into Maryland, taking Isbell with him, and remained there about two years, and then sold her to Wilson, who brought her back to Virginia. The county court gave judgment for the defendant; but the district court reversed it, on the ground that a slave born in the state, and carried to Maryland, and there sold, and brought back by the purchaser, and kept on his plantation more than one year, was entitled to freedom.

A slave born in Virginia was carried to Maryland, and there sold, and the purchaser bro't her back and kept her a year, held, that she was free.

Per Cur. Fleming, J. The case is clearly within the mischief which was intended to be remedied by the act of 1778; and it makes no difference that the slave in question was born in this state, and brought back by a citizen of this commonwealth; and that her former master afterwards returned and resided in Virginia. For he had carried her to Maryland, where he dwelt for several years, and then sold her to the appellant, who imported her into this state, in manifest violation of the express declaration of the statute, and therefore must abide the consequences. The other judges concurred, and the judgment was affirmed.

14.

RAWLINGS v. BOSTON. May T. 1793. 3 Har. & M'Henry's Rep. 139.

The petitioner claimed his freedom as being a descendant from a yellow woman, being a Portuguese, named Catharine Boston. The county court found the petitioner free. The defendant appealed to the general court, which gave the following judgment: "It being admitted, that the said Anthony Boston is a descendant of Violet, the daughter of Linah, the daughter of Maria, or Marea, and it appearing to the court, on the examination of depositions taken in this case, that Maria, or Marea, was a Spanish woman, and that her daughter Linah was born before she came into Maryland, and was of yellow color or complexion, with long black hair, the

A negro adjudged to be free being descended from a Spanish woman whose daughter, the grandmother of the petitioner, was born out of the state, and was of yellow complexion and long black hair.

court are of opinion that the said Maria, or Marea, was not a slave, but free ; therefore, it is considered by the court, that the said Anthony Boston be free and discharged from all further servitude, and that the judgment aforesaid in form aforesaid given, be in all things affirmed." And a similar judgment was given in *Boston v. Sprigg*, in the court of appeals, Nov. T. 1797.

15.

MERRY v. CHEXNAIDER. March T. 1830. 20 *Martin's Louisiana Rep.* 699.

A negro born in the Northwest-ern Terri-tory since the ordi-nance of 1787, is free.

Per Cur. Porter J. The plaintiff sues, in this action, to recover his freedom, and from the evidence on record, is clearly entitled to it. He was born in the north western territory, since the enactment of Congress, in 1787, of the ordinance for the government of that country ; according to the 6th article of which there could be therein neither slavery nor involuntary servitude. This ordinance fixed, forever, the character of the population in the region over which it extended, and takes away all foundation from the claim set up in this instance, by the defendant. The act of cession by Virginia, did not deprive congress of the power to make such a regulation.

(E.) BY THE EFFECT OF DOMESTIC LAWS.

1

BAPTIST et al v. DE VOLUNBRUN. June T. 1820. 5 *Har. & Johns. Rep.* 86.

The act prohibiting the impor-tation of slaves ap-plies to vo-luntary im-portations.

The court held that the act of 1795, prohibiting the importation of slaves, is applicable only to voluntary importations, and where the importer intends to sell the slaves, or to reside himself in the state. As where the owner of slaves in consequence of the insurrection in St. Domingo, is obliged to fly from that island and take up a temporary abode in this state with her slaves ; or where she goes first to New York, and remains there five years, and then, in order to avoid the rigors of the climate, comes with them in this state, the court held, that she was not within the prohibition of the act ; and decided on an application for freedom by the slaves, that they were not entitled. And see the case *De Fountaine et al v. De Fountaine.* 5 *Har. & Johns. Rep.* 99. (note.)

2.

COMMONWEALTH OF MASSACHUSETTS v. THOMAS AVES. Aug.
1836.

Habeas corpus to bring up the body of a negro female slave, named Med. Aves returned to the writ, that he had the body of the slave in his custody, that one Samuel Slater, of the city of New Orleans, in the State of Louisiana owned the slave Med, who was an infant about six years of age, and also the mother of the said infant slave. And that he held the mother and child as slaves, under the laws of Louisiana. That the wife of Slater, intending to visit her parents in Boston, brought the slave Med with her to her father's the defendant's house, to wait upon her, and for atemporary and very short time, when she was to return to New Orleans with the slave, that the defendant, the father of the said Mrs. Slater, had the custody of the child during a temporary absence of her mistress from the city. That the child wished to return, and the mother of the child wished and expected it to return, &c.

And where the importation is voluntary, and for a temporary time, the slave is free.

Shaw, Ch. J. The question now before the court arises upon a return to a *habeas corpus*, originally issued in vacation, by Mr. Justice Wilde, for the purpose of bringing up the person of a colored child named Med, and instituting a legal inquiry into the fact of her detention, and the causes for which she was detained. By the provisions of the revised code, the practice upon *habeas corpus* is somewhat altered. In case the party complaining, or in behalf of whom complaint is made, on the ground of unlawful imprisonment, is not in the custody of an officer, as of a sheriff or deputy, or corresponding officer of the U. S., the writ is directed to the sheriff, requiring him or his deputy to take the body of the person thus complaining, or in behalf of whom complaint is thus made, and have him before the court or magistrate issuing the writ, and to summon the party alleged to have or claim the custody of such person, to appear at the same time, and show the cause of the detention. The person thus summoned is to make a statement under oath, setting forth all the facts fully and particularly; and in case he claims the custody of such party, the grounds of such claim must be fully set forth. This statement is in the nature of a return to the writ, as made under the former practice, and will usually present the material facts upon which

the questions arise. Such return, however, is not conclusive of the facts stated in it; but the court is to proceed and inquire into all the alleged causes of detention, and decide upon them in a summary manner. But the court may, if occasion require it, adjourn the examination, and in the mean time bail the party, or commit him to a general or special custody, as the age, health, sex, and other circumstances of the case may require. It is further provided that when the writ is issued by one judge of the court in vacation, and in the mean time, before a final decision, the court shall meet in the same county, the proceedings may be adjourned into the court, and there be conducted to a final issue, in the same manner as if they had been originally commenced by a writ issued from the court. I have stated these provisions the more minutely, because there have been as yet but few proceedings under the revised statutes, and the practice is yet to be established.

Upon the return of this writ before Mr. Justice Wilde, a statement was made by Mr. Aves, the respondent; the case was then postponed. It has since been fully and very ably argued before all the judges, and is now transferred to and entered in court, and stands here for judgment, in the same manner as if the writ had been originally returnable in court.

The return of Mr. Aves states, that he has the body of the colored child described, in his custody, and produces her. It further states, that Samuel Slater, a merchant, citizen and resident in the city of New-Orleans and state of Louisiana, purchased the child with her mother in 1833, the mother and child being then and long before slaves by the laws of Louisiana; that they continued to be his property, in his service, at New-Orleans, till about the first of May last, when Mary Slater, his wife, the daughter of Mr. Aves, left New Orleans for Boston, for the purpose of visiting her father, intending to return to New Orleans after an absence of four or five months; that the mother of the child remained at New Orleans in a state of slavery, but that Mrs. Slater brought the child with her from New Orleans to Boston, having the child in her custody as the agent and representative of her husband, whose slave the child was, by the laws of Louisiana, when the child was brought thence; the object, intent, and purpose of the said Mary Slater being to have the said child accompany her, and remain in her custody, and under her care during her temporary absence

from New Orleans, and that the said child should return with her to New Orleans, the domicil of herself and her husband ; that the said child was confided to the custody and care of said Aves by Mrs. Slater, during her temporary absence in the country for her health. The respondent concludes by stating, that he has exercised no other restraint over the liberty of this child than such as was necessary to the health and safety of the child. Notice having been given to Mr. and Mrs. Slater, an appearance has been entered for them, and in this state of the case and of the parties, the cause has been heard. Some evidence was given at the former hearing, but it does not materially vary the facts stated in the return. The fact testified, which was considered most material was, the declared intent of Mrs. Slaver to take the child back to New Orleans. But as that intent is distinctly avowed in the return, that is, to take the child back to New Orleans, if it could be lawfully done, it does not essentially change the case made by the return.

This return is now to be considered in the same aspect as if made by Mr. Slater. It is made in fact by Mr. Aves claiming the custody of a slave in right of Mr. Slater, and that claim is sanctioned by Mr. Slater who appears by his attorney to maintain and enforce it. He claims to have the child as master, and carry her back to New Orleans ; and whether the claim has been made in terms or not to hold and return her as a slave, that intent is manifest, and the argument has very properly placed the claim upon that ground.

The case presents an extremely interesting question, not so much on account of any doubt or difficulty attending it, as on account of its important consequences to those who may be affected by it, either as masters or slaves.

The precise question presented by the claim of the respondent is, whether a citizen of any one of the United States, where negro slavery is established by law, coming into this state, for any temporary purpose of business or pleasure, staying some time, but not acquiring a domicil here, who brings a slave with him as a personal attendant, may restrain such slave of his liberty during his continuance here, and convey him out of this state on his return, against his consent. It is not contended that a master can exercise here any other of the rights of a slave owner, than such as

may be necessary to retain the custody of the slave during his residence, and to remove him on his return.

Until this discussion, I had supposed that there had been adjudged cases on this subject in this commonwealth; and it is believed to have been a prevalent opinion among lawyers, that if a slave is brought voluntarily and unnecessarily within the limits of this state, he becomes free, if he chooses to avail himself of the provisions of our laws; not so much because his coming within our territorial limits, breathing our air, or treading on our soil, works any alteration in his *status*, or condition, as settled by the law of his domicil, as because by the operation of our laws, there is no authority on the part of the master, either to restrain the slave of his liberty, whilst here, or forcibly to take him into custody in order to his removal. There seems, however, to be no decided case on the subject reported.

It is now to be considered as an established rule, that by the constitution and laws of this commonwealth, before the adoption of the constitution of the United States, in 1789, slavery was abolished, as being contrary to the principles of justice, and of nature, and repugnant to the provisions of the declaration of rights, which is a component part of the constitution of the state.

It is not easy, without more time for historical research than I now have, to show the course of slavery in Massachusetts. By a very early colonial ordinance, (1641,) it was ordered, that there should be no bond slavery, villeinage, or captivity amongst us, with the exception of lawful captives taken in just wars, or those judicially sentenced to servitude, as a punishment for crime. And by an act a few years after, (1646) manifestly alluding to some transaction then recent, the general court conceiving themselves bound to bear witness against the heinous and crying sin of man stealing, &c., ordered that certain negroes be sent back to their native country (Guinea) at the charge of the country, with a letter from the governor expressive of the indignation of the court thereabouts. See Ancient Charters, &c. 52. chap. 12. sections 2, 3.

But notwithstanding these strong impressions in the acts of the colonial government, slavery to a certain extent seems to have crept in; not probably by force of any law, for none such is found or known to exist; but rather it may be presumed, from that universal custom, prevailing through the European colonies, in the

West Indies, and on the continent of America, and which was fostered and encouraged by the commercial policy of the parent states. That it was so established, is shown by this, that by several provincial acts passed at various times, in the early part of the last century, slavery was recognized as existing in fact, and various regulations were prescribed in reference to it. The act passed June, 1703, imposed certain restrictions upon manumission, and subjected the master to the relief and support of the slaves, notwithstanding such manumission, if the regulations were not complied with. The act of October, 1705, levied a duty, and imposed various restrictions upon the importation of negroes, and allowed a drawback upon any negro thus imported, and for whom the duty had been paid, if exported within the space of twelve months and *bona fide* sold in any other plantation.

How, or by what act particularly, slavery was abolished in Massachusetts, whether by the adoption of the opinion in *Sommersett's* case, as a declaration and modification of the common law, or by the declaration of independence, or by the constitution of 1780, it is not now very easy to determine, and it is rather a matter of curiosity than of utility; it being agreed on all hands that if not abolished before, it was so by the declaration of rights. In the case of *Winchendon v. Hatfield*, 4 Mass. Rep. 123., which was a case between two towns respecting the support of a pauper, Chief Justice Parsons, in giving the opinion of the court, states, that of the first action which came before the court after the establishment of the constitution, the judges declared, that by virtue of the declaration of rights, slavery in this state was no more. And he mentions another case, *Littleton v. Tuttle*, 4 Mass. R. 128., note, in which was stated as the unanimous opinion of the court, that a negro born within the state, before the constitution, was born free, though born of a female slave. The chief justice, however, states, that the general practice and common usage have been opposed to this opinion.

It has recently been stated as a fact, that there were judicial decisions in this state prior to the adoption of the present constitution, holding that negroes born here of slave parents were free. A fact is stated in the above opinion of Chief Justice Parsons, which may account for this suggestion. He states, that several negroes, born in this country, of imported slaves, had demanded their freedom of their masters by suits of law, and obtained it by

a judgment of court. The defence of a master, he says, was faintly made, for such was the temper of the times, that a restless, discontented slave was worth little, and when his freedom was obtained in a course of legal proceedings, his master was not holden for his support, if he became poor. It is very probable, therefore, that this surmise is correct, and that records of judgment to this effect may be found; but they would throw very little light on the subject.

Without pursuing this inquiry farther, it is sufficient for the purposes of the case before us, that by the constitution adopted in 1780, slavery was abolished in Massachusetts, upon the ground that it is contrary to natural right and the plain principles of justice. The terms of the first article of the declaration of rights are plain and explicit: "All men are born free and equal, and have certain natural, essential, and unalienable rights, among which are, the right of enjoying and defending their lives and liberties, that of acquiring, possessing, and protecting property." It would be difficult to select words more precisely adapted to the abolition of negro slavery. According to the laws prevailing in all the states where slavery is upheld, the child of a slave is not deemed to be born free, a slave has no right to enjoy and defend his own liberty, or to acquire, possess, or protect property. That the description was broad enough in its terms to embrace negroes, and that it was intended by the framers of the constitution to embrace them, is proved by the earliest contemporaneous construction, by an unbroken series of judicial decisions, and by a uniform practice from the adoption of the constitution to the present time. The whole tenor of our policy, of our legislation and jurisprudence, from that time to the present, has been consistent with this construction, and with no other.

Such being the general rule of law, it becomes necessary to inquire how far it is modified or controlled in its operation; either,

1. By the law of other nations and states, as admitted by the comity of nations to have a limited operation within a particular state; or
2. By the constitution and laws of the United States.

In considering the first, we may assume that the law of this state is analogous to the law of England, in this respect; that while slavery is considered as unlawful and inadmissible in both, and this because contrary to natural right and to laws designed for the

security of personal liberty, yet in both, the existence of slavery in other countries is recognized, and the claims of foreigners, growing out of that condition, are to a certain extent, respected. Almost the only reason assigned by Lord Mansfield in *Sommersett's case* was, that slavery is of such a nature that it is incapable of being introduced on any reasons moral or political, but only by positive law ; and, it is so odious, that nothing can be suffered to report it but positive law.

The same doctrine is clearly stated in the full and able opinion of Marshall Ch. J., in the case of the *Antelope*. 10 Wheat. 120. He is speaking of the slave trade, but the remark itself shows that it applies to the state of slavery. "That it is contrary to the law of nature will scarcely be denied. That every man has a natural right to the fruits of his own labor is generally admitted, and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of the admission."

But although slavery and the slave trade are deemed contrary to natural right, yet it is settled by the judicial decisions of this country and of England, that it is not contrary to the law of nations. The authorities are cited in the case of the *Antelope*, and that case is itself an authority directly in point. The consequence is, that each independent community, in its intercourse with every other, is bound to act on the principle, that such other country has a full and perfect authority to make such laws for the government of its own objects, as its own judgment shall dictate, and its own conscience approve, provided, the same are consistent with the law of nations ; and no independent community has any right to interfere with the acts or conduct of another state, within the territories of such state, or on the high seas, which each has an equal right to use and occupy ; and that each sovereign state, governed by its own laws, although competent and well authorized to make such laws as it may think most expedient to the extent of its own territorial limits, and for the government of its own subjects, yet beyond those limits, and over those who are not her own subjects, has no authority to enforce her own laws, or to treat the laws of other states as void, although contrary to its own views of morality.

This view seems consistent with most of the leading cases on the subject.

Sommersett's case, 20 Howell's State Trials, 1., as already cited,

decides that slavery, being odious and against natural right, cannot exist, except by force of positive law. But it clearly admits, that it may exist by force of positive law. And it may be remarked, that by positive law in this connection, may be as well understood customary law as the enactment of a statute ; and the word is used to designate rules established by tacit acquiescence or by the legislative act of any state, and which derive their force and authority from such acquiescence or enactment, and not because they are the dictates of natural justice, and as such, of universal obligation.

The Louis, 2 Dodson's Rep. 238. This was an elaborate opinion of Sir Wm. Scott. It was the case of a French vessel seized by an English vessel in time of peace, whilst engaged in the slave trade. It proceeded upon the ground that a right of visitation by the vessels of one nation, of the vessels of another, could only be exercised in time of war, or against pirates, and that the slave trade was not piracy by the laws of nations, except against those by whose government it has been so declared by law or by treaty. And the vessel was delivered up.

The Amedis, 1 Acton's Rep. 240. The judgment of Sir Wm. Grant in this case, upon the point on which the case was decided, that of the burden of proof, has been doubted. But upon the point now under discussion, he says, but we do not lay down as a general principle, that this is a trade which cannot, abstractedly speaking, be said to have a legitimate existence. I say abstractedly speaking, because we cannot legislate for other countries ; nor has this country a right to control any foreign legislature that may give permission to its subjects to prosecute this trade. He however held, in consequence of the principles declared by the British government, that he was bound to hold, *prima facie*, that the traffic was unlawful, and threw on the claimant the burden of proof, that the traffic was permitted by the law of his own country.

The Diana, 1 Dodson, 95. This case strongly corroborates the general principle, that though the slave trade is contrary to the principles of justice and humanity, it cannot with truth be said, that it is contrary to the laws of all civilized nations ; and that courts will respect the property of persons engaged in it, under the sanction of the laws of their own country.

Two cases are cited from the decisions of courts of common law, which throw much light upon the subject.

Madrazo v. Willis. 3 B. and Ald. 353. It was an action brought by a Spaniard against a British subject, who had unlawfully and without justifiable cause, captured a ship with three hundred slaves on board. The only question was the amount of damages. Abbott, Ch. J., who tried the cause, in reference to the very strong language of the acts of parliament, declaring the traffic in slaves a violation of right, and contrary to the first principles of justice and humanity, doubted whether the owner could recover damages, in an English court of justice, for the value of the slaves as property, and directed the ship and the slaves to be separately valued. On further consideration he and the whole court were of opinion, that the plaintiff was entitled to recover for the value of the slaves. That opinion went upon the ground that the traffic in slaves, however wrong in itself, if prosecuted by a Spaniard between Spain and the coast of Africa, and if permitted by the laws of Spain, and not restrained by treaty, could not be lawfully interrupted by a British subject on the high seas, the common highway of nations. And Mr. Justice Bayley, in his opinion, after stating the general rule that a foreigner is entitled, in a British court of justice, to compensation for a wrongful act, added, that although the language used by the statutes was very strong, yet it could only apply to British subjects. It is true, he further says, that if this were a trade contrary to the law of nations, a foreigner could not maintain this action. And Best, J. spoke strongly to the same effect, adding that the statutes speak in just terms of indignation of the horrible traffic in human beings; but they speak only in the name of the British nation. If a ship be acting contrary to the general law of nations, she is thereby subject to confiscation; but it is impossible to say that the slave trade is contrary to what may be called the common law of nations.

Forbes v. Cochrane, 2 Barn. & Cressw. 448; 3 Dowl. & Ryl. 679. This case has been supposed to conflict with the one last cited; but I apprehend, in considering the principles upon which they were decided, they will be found to be perfectly reconcilable. The plaintiff a British subject, domiciled in East Florida, where slavery was established by law, was the owner of a plantation and of certain slaves, who escaped thence and got on board a British ship of war on the high seas. It was held, that he could not maintain an action against the master of the ship for harboring the slaves after notice and demand of them. Some of the opinions given in

this case are extremely instructive and applicable to the present. Holroyd, J., in giving his opinion, said, that the plaintiff could not found his claim to the slaves upon any general right, because by the English laws such a right cannot be considered as warranted by the general law of nature, that if the plaintiff could claim at all, it must be in virtue of some right, which he had acquired by the law of the country where he was domiciled, that when such rights are recognized by law, they must be considered as founded, not upon the law of nature, but upon the particular law of that country, and must be co-extensive with the territories of that state; that if such right were violated by a British subject, within such territory the party grieved would be entitled to a remedy; but that the law of slavery is a law *in invitum*, and when a party gets out of the territory where it prevails, and under the protection of another power, without any wrongful act done by the party giving that protection, the right of the master, which founded on the municipal law of the place only, does not continue. So in speaking of the effect of bringing a slave into England, he says, he ceases to be a slave in England, only because there is no law, which sanctions his detention in slavery. Best, J., declared his opinion to the same effect. Slavery is a local law, therefore if a man wishes to preserve his slaves, let them attach them to him by affection, or make fast the bars of their prison, or rivet well their chains, for the instant they get beyond the limits where slavery is recognized by the local law, they have broken their chains—they have escaped from their prison, and are free.

That slavery is a relation founded in force, not in right, existing, where it does exist, by force of positive law, and not recognized as founded in natural right, is intimated by the definition of slavery in the civil law: "*Servitus est constitutio juris gentium, qua quis dominio alieno contra naturam subjicitur.*"

Upon a general review of the authorities, and upon an application of the well established principles upon this subject, we think they fully maintain the point stated, that though slavery is contrary to natural right, to the principles of justice, humanity, and sound policy, as we adopt them, and found our own laws upon them, yet not being contrary to the laws of nations, if any other state or community see fit to establish and continue slavery by law, so far as the legislative power of that country extends, we are bound to take notice of the existence of those laws, and we are not at liberty to declare and hold an act done within those limits, unlawful

and void, upon our views of morality and policy, which the sovereign and legislative power of the place has pronounced to be lawful. If, therefore, an unwarranted interference and wrong is done by our citizens to a foreigner, acting under the sanction of such laws, and within their proper limits, that is, within the local limits of the power by whom they are thus established, or on the high seas, which each and every nation has a right in common with all others to occupy, our laws would no doubt afford a remedy against the wrong done. So, in pursuance of a well known maxim, that in the construction of contracts, the *lex loci contractus* shall govern, if a person, having in other respects, a right to sue in our courts, shall bring an action against another, liable in other respects to be sued in our courts, upon a contract made upon the subject of slavery in a state where slavery is allowed by law, the law here would give it effect. As if a note of hand made in New-Orleans were sued on here, and the defence should be that it was on a bad consideration, or, without consideration, because given for the price of a slave sold, it may well be admitted that such a defence could not prevail, because the contract was a legal one by the law of the place where it was made.

This view of the law applicable to slavery, marks strongly the distinction between the relation of master and slave as established by the local law of particular states, and in virtue of that sovereign power and independent authority, which each independent state concedes to every other, and those natural and social relations which are every where and by all people recognized, and which, though they may be modified and regulated by municipal law, are not founded upon it, such as the relation of parent and child, and husband and wife. Such, also, is the principle upon which the general right of property is founded, being in some form universally recognized as a natural right, independently of municipal law.

This affords an answer to the argument drawn from the maxim, that the right of personal property follows the person, and, therefore, where by the law of a place, a person there domiciled acquires personal property, by the comity of nations, the same must be deemed his property every where. It is obvious, that if this were true, in the extent in which the argument employs it, if slavery exists any where, and if by the laws of any place a property can be acquired in slaves, the law of slavery must extend to every place where such slaves may be carried. The maxim, therefore, and the argument can apply only to those commodities which are

every where, and by all nations, treated and deemed subjects of property. But it is not speaking with strict accuracy to say, that a property can be acquired in human beings, by local laws. Each state may, for its own convenience, declare that slaves shall be deemed property, and that the relations and laws of personal chattels shall be deemed to apply to them ; as, for instance, that they may be bought and sold, delivered, attached, levied upon, that trespass will lie for an injury done to them, or trover for converting them. But it would be a perversion of terms to say, that such local laws do in fact make them personal property generally ; they can only determine, that the same rules of law shall apply to them as are applicable to property, and this effect will follow only so far as such laws *proprio vigore* can operate.

The same doctrine is recognized in Louisiana. In the case of *Lunsford v. Coquillon*, 14 Martin's Rep. 404., it is thus stated :— The relation of owner and slave in the states of this union, in which it has a legal existence, is a creature of the municipal law. See Story's Conflict of Laws, 92. 97.

The same principle is declared by the court in Kentucky, in the case of *Rankin v. Lydia*, 3 Marshall's Rep. 470. They say, slavery is sanctioned by the laws of this state ; but we consider this as a right existing by positive law of a municipal character, without foundation in the law of nature.

The conclusion to which we come from this view of the law is this :—

That by the general and now well established law of this Commonwealth, bond slavery cannot exist, because it is contrary to natural right, and repugnant to numerous provisions of the constitution and laws, designed to secure the liberty and personal rights of all persons within its limits and entitled to the protection of the laws.

That though by the laws of a foreign state, meaning by "foreign" in this connection, a state governed by its own laws, and between which and our own, there is no dependence one upon the other, but which in this respect are as independent as foreign states, a person may acquire a property in a slave, that such acquisition, being contrary to natural right, and effected by the local law, is dependent upon such local law for its existence and efficacy, and being contrary to the fundamental laws of the state, such general right of property cannot be exercised or recognized here.

That as a general rule, all persons coming within the limits of a state, become subject to all its municipal laws, civil and criminal, and entitled to the privileges which those laws confer ; that this rule applies as well to blacks as whites, except in the case of fugitives, to be afterwards considered ; that if such persons have been slaves, they become free, not so much because any alteration has been made in their *status*, or condition, as because there is no law which will warrant, but there are laws, if they choose to avail themselves of them, which prohibit their forcible detention or forcible removal.

That the law arising from the comity of nations cannot apply ; because if it did, it would follow as a necessary consequence, that all those persons who by force of local laws, and within all foreign places where slavery is permitted, have acquired slaves as property, might bring their slaves here, and exercise over them the rights and power which an owner of property might exercise, and for any length of time, short of acquiring a domicile ; that such an application of the law would be wholly repugnant to our laws, entirely inconsistent with our policy and our fundamental principles, and is therefore inadmissible.

Whether, if a slave voluntarily brought here, and with his own consent returning with his master, would resume his condition as a slave, is a question which was incidentally raised in the argument, but is one on which we are not called on to give an opinion in this case, and we give none. From the principle above stated, on which a slave brought here becomes free, to wit, that he becomes entitled to the protection of our laws, and there is no law to warrant his forcible arrest and removal, it would seem to follow as a necessary conclusion, that if the slave waives the protection of those laws, and returns to the state where he is held as a slave, his condition is not changed.

In the case *Ex parte Grace*, 2 Haggard's Ad. R. 94., this question was fully considered by Sir Wm. Scott, in the case of a slave brought from the West Indies to England, and afterwards voluntarily returning to the West Indies ; and he held that she was reinstated in her condition of slavery.

A different decision, I believe, has been made of the question in some of the United States ; but for the reasons already given, it is not necessary to consider it further here.

The question has thus far been considered as a general one, and applicable to cases of slaves brought from any foreign state or

country; and it now becomes necessary to consider how far this result differs, where the person is claimed as a slave by a citizen of another state of this Union, that is, how the question as between citizens of different states is affected by the provision of the constitution and laws of United States.

In Article 4. sec. 2., the constitution declares that no person held to service or labor in one state, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

The law of congress made in pursuance of this article provides, that when any person held to labor in any of the United States, &c. shall escape into any other of the said states or territories, the person entitled, &c. is empowered to arrest the fugitive, and upon proof made that the person so seized under the law of the state, from which he or she fled, owes services, &c. Act of Feb. 12th, 1793.

In regard to these provisions, the court are of opinion, that as by the general law of this commonwealth, slavery cannot exist, and the rights and powers of slave owners cannot be exercised therein. The effect of this provision in the constitution and laws of the United States, is to limit and restrain the operations of this general rule, so far as it is done by the plain meaning and obvious intent and import of the language used, and no further. The constitution and law manifestly refer to the case of a slave escaping from a state where he owes service or labor, into another state or territory. He is termed a fugitive from labor; the proof to be made is, that he owed service or labor, under the laws of the state or territory *from which he fled*, and the authority given is to remove such fugitive to the state *from which he fled*. This language can, by no reasonable construction, be applied to the case of a slave who has not fled from the state, but who has been brought into this state by his master.

The same conclusion will result from a consideration of the well known circumstances under which this constitution was formed. Before the adoption of the constitution the states were, to a certain extent, sovereign and independent, and were in a condition to settle the terms upon which they would form a more perfect union. It has been contended by some over-zealous philanthropists, that such an article in the constitution could be of no

binding force or validity, because it was a stipulation contrary to natural right. But it is difficult to perceive the force of this objection. It has already been shown, that slavery is not contrary to the law of nations. It would then be the proper subject of treaties among sovereign and independent powers.

Suppose instead of forming the present constitution, or any other confederation, the several states had become in all respects sovereign and independent, would it not have been competent for them to stipulate, that fugitive slaves should be mutually restored, and to frame suitable regulations, under which such a stipulation should be carried into effect? Such a stipulation would be highly important and necessary to secure peace and harmony between adjoining nations, and to prevent perpetual collisions and border wars. It would be no encroachment on the rights of the fugitive; for no stranger has a just claim to the protection of a foreign state against its will, especially where a claim to such protection would be likely to involve the state in war; and each independent state has a right to determine by its own laws and treaties, who may come to reside or seek shelter within its limits. Now, the constitution of the United States partakes both of the nature of a treaty and of a form of government. It regards the states, to a certain extent, as sovereign and independent communities, with full power to make their own laws, and regulate their domestic policy, and fixes the terms upon which their intercourse with each other shall be conducted. In respect to foreign relations, it regards the people of the state as one community, and constitutes a form of government for them. It is well known that when this constitution was formed, some of the states permitted slavery and the slave trade, and considered them highly essential to their interests, and that some other states had abolished slavery within their own limits, and from the principles deduced and policy avowed by them, might be presumed to desire to extend such abolition further. It was therefore manifestly the intent and the object of one party to this compact to enlarge, extend and secure, as far as possible, the rights and powers of the owners of slaves, within their own limits, as well as in other states, and of the other party to limit and restrain them. Under these circumstances the clause in question was agreed on and introduced into the constitution; and as it was well considered, as it was intended to secure future peace and harmony, and to fix as precisely as language could do it, the limit to which the rights of one party should be exercised within the territory of the other, it is to be presumed that they selected terms intended to express their

exact and their whole meaning ; and it would be a departure from the purpose and spirit of the compact to put any other construction upon it than that to be derived from the plain and natural import of the language used. Besides, this construction of the provision in the constitution gives to it a latitude sufficient to afford effectual security to the owners of slaves. The states have a plenary power to make all laws necessary for the regulation of slavery and the rights of slave owners, whilst the slaves remain within their territorial limits ; and it is only when they escape, without the consent of their owners, into other states, that they require the aid of other states to enable them to regain their dominion over the fugitives.

But this point is supported by most respectable and unexceptionable authorities.

In the case of *Butler v. Hopper*, 1 Wash. C. C. Rep. 499., it was held by Mr. Justice Washington, in terms, that the provision in the constitution which we are now considering, does not extend to the case of a slave voluntarily carried by his master into another state, and there leaving him under the protection of some law declaring him free. In this case, however, the master claimed to hold the slave in virtue of a law of Pennsylvania, which permitted members of congress and sojourners, to retain their domestic slaves, and it was held that he did not bring himself within either branch of the exception, because he had, for two years of the period, ceased to be a member of congress, and so lost the privilege ; and by having become a resident could not claim as a sojourner. The case is an authority to this point, that the claimant of a slave, to avail himself of the provisions of the constitution and laws of the United States, must bring himself within their plain and obvious meaning, and they will not be extended by construction ; and that the clause in the constitution is confined to the case of a slave escaping from one state and fleeing to another.

But in a more recent case, the point was decided by the same eminent judge. *Ex parte Simmons*, 4 Wash. C. C. Rep. 396. It was an application for a certificate under § 3 of the act of Feb. 12. 1793. He held that both the constitution and laws of the United States apply only to fugitives, escaping from one state and fleeing to another, and not to the case of a slave voluntarily brought by his master.

Another question was made in that case, whether the slave was free by the laws of Pennsylvania, which like our own in effect,

liberate slaves voluntarily brought within the state, but there is an exception in favor of members of congress, foreign ministers, consuls, and *sojourners*: but this provision is qualified as to sojourners and persons passing through the state in such a manner as to exclude them from the benefit of the exception, if the slave was retained in the state longer than six months. The slave in that case having been detained in the state more than six months, was therefore held free.

This case is an authority to this point: The general rule being, that if a slave is brought into a state where the laws do not admit slavery, he will be held free, the person who claims him as a slave, under any exception or limitation of the general rule, must show clearly that the case is within such exception.

The same principle was substantially decided by the state court of the same state in the case of *Commonwealth v. Holloway*, 2 Serg. & Rawle, 305. It was the case of a child of a fugitive slave, born in Pennsylvania. It was held that the constitution of the U. States was not inconsistent with the law of Pennsylvania; that as the law and constitution of the U. S. did not include the issue of fugitive slaves in terms, it did not embrace them by construction or implication. The court considers the law as applying only to those who *escape*. Yet by the operation of the maxim which obtains in all the states wherein slavery is permitted by law, *partus sequitur ventrem*, the offspring would follow the condition of the mother, if either the rule of comity contended for applied, or if the law of the United States would be extended by construction.

The same decision has been made in Indiana, 3 American Jurist, 404.

In Louisiana, it has been held, that if a person with a slave goes into a state to reside where it is declared that slavery shall not exist, for ever so short a time, the slave, *ipso facto*, becomes free, and will be so adjudged, and considered afterwards in all other states; and a person moving from Kentucky to Ohio, to reside, his slaves thereby became free, and were so held in Louisiana. This case also fully recognizes the authority of states to make laws dissolving the relation of master and slave; and considers the special limitation of the general power, by the federal constitution, as a forcible implication in proof of the existence of such general power. *Lunsford v. Coquillon*, 14 Martin's Rep. 465.

And in the above cited case from Louisiana, it is very significantly remarked, that such a construction of the constitution and

law of the United States can work injury to no one, for the principle acts only on the willing and *volenti non fit injuria*.

The same rule of construction is adopted in analogous cases in other countries, that is, where an institution is forbidden, but where for special reasons, and to a limited extent, such prohibition is relaxed, the exemption is to be construed strictly, and whoever claims the exemption must show himself clearly within it, and where the facts do not bring the case within the exemption, the general rule has its effect.

By a general law of France, all persons inhabiting, or being within the territorial limits of France, are free. An edict was passed by Louis XIV. called 'Le Code Noir,' respecting slavery in the colonies. In 1716, an edict was published by Louis XV. concerning slavery in the colonies, and reciting, among other things, that many of the colonists were desirous of bringing their slaves into France, to have them confirmed in the principles of religion, and to be instructed in various arts and handicrafts, from which the colonists would derive much benefit, on the return of the slaves, but that many of the colonists feared that their slaves would pretend to be free on their arrival in France, from which their owners would sustain considerable loss, and be deterred from pursuing an object at once so pious and useful. The edict then provides a series of minute regulations to be observed both before their departure from the West Indies, and on their arrival in France, and if all these regulations are strictly complied with, the negroes so brought over to France shall not thereby acquire any right to their freedom, but shall be compellable to return; but if the owners shall neglect to comply with the prescribed regulations, the negroes shall become free, and the owners shall lose all property in them. 20 Howell's State Trials, 15, note.

The constitution and laws of the United States, then, are confined to cases of slaves escaping from other states and coming within the limits of this state without the consent and against the will of their masters, and cannot by any sound construction extend to a case where the slave does not escape and does not come within the limits of this state against the will of the master, but by his own act and permission. This provision is to be construed according to its plain terms and import, and cannot be extended beyond this, and where the case is not that of an escape, the general rule shall have its effect. It is upon these grounds, we are of opinion, that

an owner of a slave in another state, where slavery is warranted by law, voluntarily bringing such slave into this state, has no authority to detain him against his will, or to carry him out of the state against his consent, for the purpose of being held in slavery.

This opinion is not to be considered as extending to a case where the owner of a fugitive slave having produced a certificate according to the law of the United States, is *bona fide* removing such slave to his own domicil, and in so doing passes through a free state ; where the law confers a right of favor, by necessary implication, it gives the means of executing it. Nor do we give any opinion upon the case, where an owner of a slave in one state, is *bona fide* removing to another state where slavery is allowed, and in so doing necessarily passes through a free state, or arrives by accident or necessity he is compelled to touch or land therein, remaining no longer than necessary. Our geographical position exempts us from the probable necessity of considering such a case, and we give no opinion respecting it.

The child who is the subject of this *habeas corpus*, being of too tender years to have any will, or give any consent to be removed, and her mother, being a slave and having no will of her own, and no power to act for the child, she is necessarily left in the custody of the law. The respondent having claimed the custody of the child in behalf of Mr. and Mrs. Slater, who claim the right to carry her back to Louisiana, to be held in a state of slavery, we are of opinion that his custody is not to be deemed by the court a proper and lawful custody.

Under a suggestion made in the outset of this inquiry, that a probate guardian would probably be appointed, we shall for the present order the child into a temporary custody, to give time for an application to be made to the judge of probate.

3.

BUTLER et al. v. DELAPLAINE. Oct. T. 1821. 7 Serg. & Rawle's Rep. 378.

Held by the court, *Duncan, J.*, that the sojourning of a master, a citizen of another state, with his slave in this state at different times, will not entitle such slave to freedom, unless there was at some time a continued residence here, or retaining of the slave for six months, unless, perhaps, in the case of a fraudulent removal backwards and forwards. Sojourn-
ing, &c.

4.

COMMONWEALTH V. GRIFFITH. Oct. T. 1823. 2 Pick. Mass.
Rep. 11.

A slave belonging to a person in Virginia escaped into this state, after which the owner died: it was held, that by U. States Laws, 2 congress, 2 sess. ch. 7., the slave might be seized without a warrant, in order to be taken before a judge, &c., and that that statute was not unconstitutional; that the administrator of the deceased, being by the law of Virginia the person to whom the service of the slave was due, might, by himself or his agent, make such seizure without taking out letters of administration here; and that an instrument under seal was not requisite in the appointment of such an agent.

This was an indictment for an assault and battery and false imprisonment, committed on the body of a negro, named Randolph, in the town of New Bedford. A trial was had upon the general issue, and the allegations in the indictment were proved. The defence set up, and which also was proved, was, that Randolph was a slave, formerly the property of one M'Carty, of the state of Virginia, who was now deceased. Randolph having fled from his service in his life time. It was in evidence, that Randolph came to New Bedford four or five years ago, and that he had a dwelling house there, which he had acquired and held as his own. The defendant had authority in writing (with a scroll in the place of a seal) from one Mason, the administrator on the estate of M'Carty, and as Mason's agent and attorney to seize and arrest. Randolph, pursuant to United States Laws, 2d congress, 2. sess. ch. 7. §. 3., respecting persons escaping from the service of their masters, and to take him before a judge or magistrate, and then to remove him to the state of Virginia, from which he had fled. It was proved, that by the laws of Virginia, the service of the slave upon the decease of M'Carty became due to Mason, the administrator; but it also appeared, or was admitted, that by the laws of Massachusetts, Randolph did not owe service to any one; and farther, that no letters of administration had been granted upon the estate of M'Carty within this commonwealth. The defendant, accompanied by a deputy sheriff, but without any warrant or other legal process, (though it appeared that application had been made by him to the district judge of the United States, who had decided that a warrant or other process was not authorized by the act of congress, and was not necessary,) seized Randolph, and kept him in confinement for an hour or more, intending to have an examination before a magistrate, pursuant to the act above mentioned. A verdict was taken against the defendant; and it was agreed, that if the court should determine that the act of congress was not valid, or that the administrator had not power, according to the true construction of that act, and of the laws of Virginia, as above mentioned, by himself, his agent, or attorney, to reclaim the slave, or that the letter of attorney was not sufficient

to operate in Massachusetts, then the verdict should stand ; otherwise that the defendant should be discharged.

Parker, Ch. J., delivered the opinion of a majority of the court, in substance as follows. The first question is, whether the defendant was duly empowered as an agent to reclaim the slave. We do not decide whether a scroll is a seal, though probably it would not be so considered in this state. But we think that a letter of attorney was not required to communicate power to this agent.

In general, a seal is not necessary, except to authorize the making of a sealed instrument. A common letter, or a parol authority, is sufficient for making many important contracts. The words of the statute are, "the person to whom such labor or service may be due, his agent, or attorney." If a letter of attorney were required, the statute would have used the word *attorney* only ; but the word *agent* being used, serves to explain the intention of the legislature. The question then is, whether Mason, having been duly appointed administrator under the laws of Virginia, had a right to come here himself and claim the slave ; for the claim by his agent was the same as if made by himself. It has been decided, that a foreign administrator cannot come here to collect a debt ; and if it was necessary to pursue the slave in the character of administrator, the authorities are clear against the defendant. But by the statute of the United States, the person to whom the service is due, may reclaim, and by the laws of Virginia an administrator is such person. Taking both together, Mason might come here to reclaim ; and it was not necessary that he should come in the character of an administrator. This brings the case to a single point, whether the statute of the United States giving power to seize a slave without a warrant is constitutional. It is difficult in a case like this, for persons who are not inhabitants of slave holding states, to prevent prejudice from having too strong an effect on their minds. We must reflect, however, that the constitution was made with some states in which it would not occur to the mind to inquire whether slaves were property. It was a very serious question, when they came to make the constitution, what should be done with their slaves. They might have kept aloof from the constitution. That instrument was a compromise. It was a compact by which all are bound. We are to consider, then, what was the intention of the constitution. The words of it were used out of delicacy, so as not to offend some in the convention whose feelings were abhorrent to slavery ; but we there entered into an agreement that slaves

should be considered as property. Slavery would still have continued if no constitution had been made. The constitution does not prescribe the mode of reclaiming a slave, but leaves it to be determined by congress. It is very clear, that it was not intended that application should be made to the executive authority of the state. It is said that the act which congress has passed on this subject, is contrary to the amendment of the constitution, securing the people in their persons and property against seizures, &c. without a complaint upon oath. But all the parts of the instrument are to be taken together. It is very obvious, that slaves are not parties to the constitution, and the amendment has relation to the parties.

But it is said, that when a seizure is made, it should be made conformably to our laws. This does not follow from the constitution, and the act of congress says, that the person to whom the service is due, may seize, &c. Whether the statute is a harsh one, is not for us to determine. But it is objected, that a person may in this summary manner seize a freeman. It may be so ; but this would be attended with mischievous consequences to the person making the seizure, and a *habeas corpus* would lie to obtain the release of the person seized. We do not perceive that the statute is unconstitutional, and we think the defence is well made out.

5.

MURRAY, a pauper, v. M'CARTY. March T. 1811. 2 Munf. Rep. 393.

The act of 1792 concerning the importation of slaves does not extend to citizens returning to the state after a temporary residence abroad.

Suit for freedom. It was agreed, that M'Carty, the owner of the slave, was born in Virginia, and before he became of age, was married in Maryland, where he continued to reside with his father-in-law from the year 1800 to 1804, when he and his family left Maryland and came to reside in Virginia, and brought the slave with him, and took the oath against evading the laws for preventing the farther importation of slaves. During M'Carty's residence in Maryland he built no house, nor rented any, but resided with his father-in-law ; and during the residence was at one time in Virginia, and voted at the election of delegates. The court was of opinion the law was for the defendant. Verdict and judgment for defendant, which being affirmed in the district court, the plaintiff appealed.

The judges gave their opinions. Cabell, J., observed, that a temporary residence abroad would not divest a man of the charac-

ter of a citizen or subject of a state or nation to which he may belong. There must be a removal with an intention to lay aside that character ; and he must actually join himself to some other community. By the act of assembly passed 17th of December, 1792, Rev. Code, vol. 1. p. 186., the privilege of bringing slaves into this commonwealth can be claimed by those persons only, who at the time of their removal, were citizens, *not of this*, but of some other state ; and as it is admitted that the appellee was a native of this state, and has not laid aside that character, the judgment must be reversed. And Judges *Roane* and *Fleming* concurred.

6.

BARNETT v. SAM. April T. 1821. 1 Gilmer's Virginia Rep. 232.

This was a suit for freedom, *in forma pauperis*, by Sam. The following case was made by a demurrer to evidence in the county court of Amherst. Sam was born in the county of Augusta, about the year 1788, the slave of Mary Teas, a native of that county, then residing there. Mary Teas removed to North Carolina about 1790, where she resided, and Sam with her, three years. In 1793 she returned to Virginia, bringing Sam with her ; and not complying with the requisitions of the statute of Virginia of 1792, Rev. of 1792, p. 103. She continued in Virginia until the year 1811, when she sold Sam to Barnett. The county court gave judgment for the plaintiff on the demurrer to evidence. The judgment was affirmed on appeal to the superior court of law ; and an appeal was taken to this court.

The act of 1792 requiring persons removing to Virginia with slaves to observe certain formalities has no application to a citizen of Virginia removing to another state with slaves, and returning with them to Virginia before the repeal of the law

Per Cur. Roane, J. The court is of opinion, that Mrs. Teas, under whom the appellant claims, having never renounced her character of citizen of Virginia, nor acquired that of a citizen of North Carolina, is not embraced by the first part of the proviso of § 4. ch. 103. (p. 186. of Pleasants' edition of the laws,) under the decision of this court in the case of *Murray v. M'Carty*, 2 Munf. Rep. 393., so as to deprive a slave purchased by her in another state, after the passing of that act, and brought into this commonwealth, of the right of freedom, enuring to him under the 2d section thereof : but the appellee in this case having been, at the time of the commencement of this act, actually owned by the said Mrs. Teas, his right to freedom is barred by that circumstance, under the provision as to citizens of the commonwealth, contained in the last part of the said proviso ; and this, *a fortiori*, as the said Mrs. Teas had owned the appellee as a slave in Virginia, and carried him with her into

North Carolina. Both judgments are to be reversed, and entered for the appellant.

7.

MONTGOMERY v. FLETCHER. Dec. T. 1828. 6 Rand's Rep. 612.

The importation under the act may be by an agent.

Suit in *forma pauperis* by the plaintiff to recover his freedom. It appeared that Robert Whiteford, an inhabitant of Maryland, intending to move with his family and slaves to Virginia, sent his son to Fauquier in this state, where he bought a farm for his father, and settled the slaves upon it, of which the plaintiff was one. The son took the oath prescribed by the act of 1792, to be taken by those who remove from another state to this with slaves. The father soon after followed, and became a citizen of this state, where he died, and the plaintiff was sold to the defendant. Verdict and judgment for defendant.

Per Cur. The president. The son, who was agent for the father, and the father were the importers of the slaves. Both intended to become, and did become citizens of Virginia, by which the law was satisfied; its policy being to exclude slaves generally, but to admit them when brought by persons removing from another state and becoming citizens. Either the son or the father might take the oath. Judgment affirmed.

8.

GOMEZ v. BONNEVAL. June T. 1819. 6 Martin's Louisiana Rep. 656.

A slave does not become free on his being illegally imported into the state.

Per Cur. *Derbigny, J.* The petitioner is a negro in actual state of slavery; he claims his freedom, and is bound to prove it. In his attempt, however, to show that he was free before he was introduced in this country, he has failed; so that his claim now rests entirely on the laws prohibiting the introduction of slaves in the United States. That the plaintiff was imported since that prohibition does exist, is a fact sufficiently established by the evidence. What right he has acquired under the laws forbidding such importation is the only question which we have to examine. Formerly, while the act dividing Louisiana into two territories was in force in this country, slaves introduced here in contravention to it, were freed by operation of law; but that act was merged in the legislative provisions, which were subsequently enacted on the subject of importation of slaves into the United States generally. Under the now existing laws, the individuals thus imported acquire no personal rights;

they are mere passive beings, who are disposed of, according to the will of the different state legislatures. In this country, they are to remain slaves, and to be sold for the benefit of the state. The plaintiff, therefore, has nothing to claim as a freeman; and as to a mere change of master, should such be his wish, he cannot be listened to in a court of justice.

9.

LINK V. BENER. 3 Caines' Rep. 325.

Held by the court, that a slave brought into the state of New York after June 1785, and sold after October, 1801, is within the protection of the act of 1788, and entitled to be free, notwithstanding the law of 1788 is repealed by the act of April, 1801, the slave having acquired under the statute of 1788 a right not to be sold; that right is preserved to him by the proviso of the repealing act of 1801.

In New-York.

10.

HELM V. MILLER. January T. 1820. 17 Johns. Rep. 236.

The court held, that under the act of February, 1788, to prevent the importation of slaves within this state, a sale in a due course of administration, or by persons acting in *auter droit*, would not be within the act, (*Sable v. Hitchcock*, 2 Johns. Cas. 79.,) so as to emancipate the slave. But where the sale was made by the husband of the executrix, who was also legatee of the slave, to pay his private debt, and was not made to pay the debt of the intestate, the sale was within the act, and the slave was entitled to his freedom.

Sale of.

11.

HENDERSON V. NEGRO TOM. June T. 1817. 4 Har. & Johns. Rep. 282.

Held by the court, that where a slave had been imported into this state in 1792 by his owner, who had not complied with the provisions of the act of April 1783, ch. 23., by causing a registry,

The slave imported must be registered.

* If a slave escape from his master in Virginia, and be found in the District of Columbia, and be there sold by his master, the slave does not thereby acquire a right to his freedom. *Negro Emanuel v. Henry W. Ball*. June T. 1814. p. 24. And the court held, in the case of *Negro Violette v. Henry W. Ball*, *ibid.* p. 24., the court refused to instruct the jury, that the petitioner was entitled to her freedom, for being sent from the city of Washington to Virginia for sale, (not being sold,) and returned to this city, being absent 8 or 9 months.

&c. to be made of such slave, that the slave was entitled to his freedom. See the case of *Scott v. Negro Ben*, 6 Cranch's Rep. 1.

12.

HANEY V. WADDLE. May T. 1815. 3 Har. & Johns. Rep. 557.

A minor can do no act to affect his rights under the act to prevent the importation of slaves.

On a petition for freedom the court below held, that the petitioner was entitled to his freedom, having been imported into the state by a minor. That a minor had no more authority to import slaves into this state than an adult, and that neither the one nor the other had such authority. The defendant appealed.

The court dissented from the opinion of the county court, on the ground that the minor could do no act to affect his rights, nor could his guardian for him; that the guardian of a minor importing a slave did not entitle him to freedom, nor did the assent of the minor, during his minority, give such a title. And see *Sprigg v. Negro Mary*, 3 Har. & Johns. Rep. 491.

13.

NEGRO JAMES V. GAITHER. Dec. T. 1807. 2 Har. & Johns. Rep. 176.

The act directing the mode of emancipation must be complied with.

Held by the court, that parol evidence is not admissible to prove that a deed of manumission was attested in the presence of two witnesses, when it appeared only one had signed the instrument; and that a deed of manumission executed in the presence of one witness only, will not give freedom to the slaves mentioned therein. By the act of 1752, ch. 1. § 5., two witnesses are necessary, and they must subscribe their names to the deed of manumission.

14.

FULTON V. LEWIS. May T. 1815. 3 Har. & Johns. Rep. 564.

Importation by a person flying from St. Domingo.

Petition for freedom. John Levant removed from St. Domingo in July, 1793, of which place he was a native, to the city of Baltimore, to avoid the insurrection in the former place, and brought with him three negroes as his slaves. He sold one of the negroes, the petitioner, to Clem, who sold him to the defendant, and Levant returned to the West Indies in 1796.

The court decided on this statement of facts, that the petitioner was entitled to his freedom; and on appeal to this court the judgment was affirmed.

15.

COMMONWEALTH v. HALLOWAY. July T. 1816. 2 Serg. & Rawle's Rep. 305.

Habeas corpus for the body of Eliza, a negro girl. It appeared that Eliza was the daughter of Mary, a slave who absconded from her master in Maryland, and came to Philadelphia, where she resided about two years, when Eliza was born. And the question was, whether *birth*, in Pennsylvania, gives freedom to a child of a slave who had absconded from another state before she became pregnant.

Birth in Pennsylvania gives freedom to the child of a slave who absconded from another state before she became pregnant.

Held by the court, that by the act of March, 1780, which declares "that all servitude for life, or slavery of children, in consequence of the slavery of their mothers, in the case of all children born within the state, from and after the passing of this act, shall be utterly taken away and extinguished, and forever abolished," which not being repugnant to the constitution, or laws of congress, was clear in favor of Eliza, and that she was born free.

Per Yeates, J. Whatever may have been our ideas of the rights of slave holders in our sister states, we cannot deny that it was competent to the legislature to enact a law ascertaining the freedom of the issue of slaves born after the passing of the act within this state.

16.

COMMONWEALTH ex rel., HALL v. COOK. Sep. T. 1822. 1 Watts' Rep. 155. COMMONWEALTH v. ROBINSON, *ibid.* p. 158.

Habeas corpus to bring up Hannah Hall, who had been a slave of Mrs. Williamson for life.

Mrs. Williamson had resided in the District of Columbia with Hannah, and removed into Pennsylvania, bringing Hannah with her to reside, where she signed an indenture to serve her mistress, Mrs. Williamson, for the period of seven years. The indenture stated, that it was entered into in pursuance of a parol agreement made before their removal into Pennsylvania. No other proof of that fact, however, existed. The indenture was transferred to Cook. And the question was whether an indenture, in consideration of manumission executed in Pennsylvania was valid.

The Court. *Rogers, J.*, held the indenture invalid. The contract was *nudum pactum*. There was no consideration; the slave

A citizen of the District of Columbia removed into Pennsylvania to reside, and brought with her a slave, who in consideration of manumission bound herself to serve seven years, the court held the indenture void.

was free the moment her mistress brought her into Pennsylvania to reside. And after referring to 1 Yeates' Rep. 365., 6 Binney's Rep. 204., 4 Serg. & Rawl, 218., held, that the indenture would be valid if it was executed in a state where slavery is recognized, by a person who was a slave. But this indenture was invalid, although made in pursuance of a parol agreement entered into in the District of Columbia. And see Commonwealth v. Clements, 6 Binney's Rep. 207.

17.

After a certificate is granted by a magistrate the writ *de homine repligando* will not lie. The legislation belongs exclusively, on this subject, to the national government. The state laws yield to the superiority of the general government. It is not necessary that the owner of a slave be a citizen of the state from which the slave fled, to entitle him to the provisions of the constitution and laws of the U. S.

JACK, a negro man, v. MARTIN. July T. 1834. 12 Wendell's Rep. 311.

Per Cur. Nelson, J. Where a slave escapes from one state into another, and is pursued by his owner, and taken before a magistrate, and the magistrate, in *pursuance of the law of congress*, examines into the matter, and grants a certificate, that the slave owes service or labor to the person claiming him, and allows the claimant to remove him to the state from which he fled, the claimant cannot be prevented from removing him by a writ *de homine repligando* sued out under the authority of a state law. The right of legislation on this subject belongs *exclusively* to the national government; and if such right be conceded to have been originally *concurrent*, after the exercise of its power by the *national government*, all control over the subject by the *state governments* necessarily ceases, so as to avoid the effects of adverse and conflicting legislation. In cases of collision, *state laws* yielded to the superior authority of the laws of the *general government*.

To entitle the owner of a slave to the benefit of the provisions of the *constitution and law of the United States*, in this respect, it is not necessary that he should be a *citizen of the state from which the slave fled*; it is only incumbent upon him to show, that under the laws of the state from which the slave escaped, he is entitled to the service or labor of the slave.

18.

COMMONWEALTH v. GRIFFEN. Oct. T. 1832. 7 J. J. Marshall's Rep. 588.; COMMONWEALTH v. GREATHOUSE, *ibid.* p. 590.

Bringing a slave into the state contrary to the statute of 1815, is an indictable offence.

The court, *Robertson, J.*, held, that bringing a slave into Kentucky by a person not protected by any of the exceptions in the

statute of 1815, although he intends to export, and afterwards exports the slave to another state for sale, is an importation in this state, in violation of the statute. And an importation for any purpose, or by any person not authorized by the statute, is an indictable offence. And the indictment need not charge a sale of them. Importation is one specific offence, and a subsequent sale is another.

(F.) BY IMPLICATION.

1.

OATFIELD v. WARING. May T. 1817. 14 Johns Rep. 188.

The court seemed to apply the principle, that where a person brings an action against another, he cannot afterwards claim him as his slave. *Spencer, J.*, observed, that the fact that the defendant had sued the plaintiff for harboring his slave, goes a great way in establishing that he was free; at all events it is a very solemn concession of the defendant that he was so. And consequently had a right to bring the action.

Bringing an action against another is a concession that he is free, and cannot be claimed as a slave.

2.

HALL v. MULLIN. June T. 1821. 5 Har. & Johns. Rep. 190.

Trespass quare clausum fregit. The plaintiff claimed title to the close in question by the will of Henry L. Hall, who devised as follows: "I give and devise to Dolly Mullin one hundred and forty acres of land, being part of the tract called Partnership," &c. Dolly Mullin was the slave of the testator. Judgment was entered for the plaintiff, by consent, and the defendant appealed to this court.

A devise of property real or personal to a slave, by his owner, entitles the slave to freedom by implication.

Per Cur. *Johnson, J.* At the time of the will of Henry L. Hall, it was in his power to have set Dolly Mullin free; and the question is, has he done so by implication? It was admitted, and could not be denied, that by the devise of the land, and the bequest of other property, she must be freed in order to give effect to such devise and bequest. Her freedom could certainly be implied from the devise itself.

Per Chase, Ch. J. I am also of opinion that Dolly Mullin, being the slave of Henry L. Hall, the will of the said Henry L. Hall will operate, and is effectual to manumit and give freedom to Dolly Mullin, and that she acquired a capacity, and was rendered

capable of taking, and did take the lands devised to her under the will.

. 3.

MEILLEUR et al. v. COUPRY. May T. 1829. 26 Martin's Louisiana Rep. 128.

A slave under thirty years of age cannot be presumed to have been emancipated.

Per Cur. Martin, J. The heirs of Louise Rilieux obtained a rule against Coupry, who had obtained letters testamentary on her estate, to show cause why they should not be revoked, and suggesting that he was a slave, and therefore incapable of exercising the office of testamentary executor. He contended that he was a freeman. The court thought otherwise. The letters were revoked, and he appealed. It was admitted, that he was born of a slave mother; that his mother's owner has ever resided, and still resides, in New Orleans; that he is twenty-seven or twenty-eight years of age; that he has enjoyed his freedom for fourteen years, and been married as a freeman.

On these facts, it is clear, he was born a slave, and must continue so, unless he was emancipated; as he is under the age of thirty years, and the lawful emancipation of a slave cannot take place before that age, the presumption of a legal emancipation, which might result from his long possession of his freedom, is repelled from the evident impossibility his legal emancipation having taken place and the legal impossibility of a slave becoming free without a legal emancipation. Prescription can no more avail him, than it would the possessor of property evidently out of commerce. Judgment affirmed.

NOTE.—It will be seen by this chapter that the owner of slaves may emancipate them by deed, will, or by a contract executed. But to this benevolence of the owner there are, in the most of the states, restraints upon the exercise of this power by the owner. Slaves are recognized wherever the system is tolerated as property, and are subject to all the rules in the acquisition, possession, and transmission of property. It would seem, therefore, upon a first view of the case, that the owner should do with his property whatever he pleased, and should have the privilege of renouncing his right to it whenever he pleased, and without being qualified by any public laws or regulations upon the subject. Such, how-

ever, is not the fact ; restraints upon this right exist in nearly all the states.

By the Rev. Stat. of Missouri, p. 587., any person may emancipate his or her slave, by last will, or other instrument in writing, under hand and seal attested by two witnesses, and proved and acknowledged in the circuit court of the county where the party resides ; but there is a saving as to creditors of debts prior to the act of emancipation. And provision is made to compel the emancipator to support the emancipated slave, where in the judgment of the court he was of unsound mind, or above forty-five years of age, or under twenty-one, or if a female, under eighteen years.

By the revised code of Virginia, vol. 1. p. 432., slaves may be emancipated by last will and testament, or writing, under hand and seal, attested and proved in the county or corporation court by two witnesses, or acknowledged by the party in the court of the county where he or she resides, to emancipate or set free, his or her slaves, or any of them who shall thereupon be entirely and fully discharged from the performance of any contract entered into during servitude. But the slaves emancipated are made liable for the previous debts of the owner.

Emancipation is guarded in Tennessee by a provision, (statute of 1777,) that the state must assent, or the act of manumission by deed or will is ineffectual, and as it appears, *Fisher v. Dabbs*, 6 Yerger's Rep. 119., the emancipated slave must be immediately removed beyond the limits of the United States.

By the statute law of Alabama, Aikens' Dig. 647., slaves may be emancipated by the master, on application to the county court, and on proof of meritorious services ; but the slave must remove out of the limits of the state. And the rights of creditors are preserved. Similar provisions are to be found in the other states. 1 Rev. Code of Virginia, p. 436. ; Rev. Code of Mississippi, p. 385., &c.

When it is considered that slaves are a peculiar species of property, it will not excite surprise that laws are necessary for their regulation, and to protect society from even the benevolence of slave owners, in throwing among the community a great number of stupid, ignorant, and vicious persons, to disturb its peace, and to endanger its permanency.

The right of society to regulate and control the ownership of this kind of property may be justified on the same grounds as

some other species of property. No one can doubt the right of individuals to acquire, possess, and sell gun powder. But if the possessor chooses to take it to his house or store, in a city or populous town, the public become interested, and will restrain him within reasonable and proper limits. In New York, Philadelphia, Baltimore, and other populous places, this property, as an article of commerce, is regulated (as to the quantity to be kept in the city,) by the public laws. And the constitutionality of those laws cannot be doubted. So of slaves. The owner may keep as many as he pleases, but if he emancipates them, and turns them loose upon society, they have a right to protect themselves against his improvidence, or even his benevolence and generosity. They have a right to declare the act illegal or to restrain it within such bounds as shall secure their safety.

(XX.) OF SUITS FOR FREEDOM*

(A) OF THE ACTION.

1.

MIMA QUEEN AND CHILD v. HEPBURN. Feb. T. 1813.
7 Cranch's Rep. 290.

The rule of evidence in suits for freedom the same as in other cases.

Held by the court, that there is no legal distinction between the assertion of a claim for freedom, and any other right, which will justify the application of a rule of evidence to cases of this description, which would be inapplicable to general cases, in which the right to property may be asserted.

* By the Revised Code of Mississippi, p. 388. § 76., provision is made that a person held in slavery may petition the court, and if the slave be in the possession of the master, the master is required to enter into a bond, conditioned that the slave shall be forthcoming, subject to the order of the court. And if the slave be out of the possession of the master, the slave must enter into a recognizance with security to make good the cost and damages. And where the master fails to give security for the forthcoming of the slave, the court is empowered to order the slave into the custody of the sheriff.

2.

RANKIN v. LYDIA. Fall T. 1820. 2 Marshall's Rep. 467.

Held by the Court, *Mills*, J., that a person of color, entitled to be free by the municipal laws of any state, where he has been domiciled, (as for instance being taken by his master into a state which prohibited slavery, to reside) may prosecute his right to freedom in any other state. It is a vested personal right to freedom, which exists where ever he is, or wherever he goes.

Suit for
may be
brought in
any state.

3.

EVANS v. KENNEDY. Oct. T. 1796. 1 Haywood's North Carolina Rep. 422.

The plaintiff was a person of color, who claimed his freedom, and was detained in slavery by the defendant. The plaintiff and defendant had agreed that an action should be instituted without process, and an issue made up to try the fact; and some doubts now arising in regard to the proper form of action, and of the issue to be made up, they referred it to the court to direct the proper form of action and issue.

If a person
be unjustly
detained in
slavery,
trespass
and false
imprison-
ment is the
proper ac-
tion, to try
his right to
be free.

Per Cur. The action used on such occasions for eight or ten years past, is the action of trespass and false imprisonment, to which the defendant pleaded that the plaintiff is a slave, and cannot maintain an action; and this the plaintiff replies, he is not a slave; and an issue is made up upon this point, and tried by a jury.

4.

CARPENTIER v. COLEMAN. 1802. 2 Bay's. Rep. 436.

Held by the court, that in an action to try the right of negroes to freedom, an order for security for their protection, and for their forthcoming at the trial, may be made at the commencement of the suit, or at any time during its pendency.

The court
will grant
an order
for the
forthcom-
ing of the
petition-
ers.

5.

MARIE v. AVART. June T. 1819. 6 Martin's Louisiana Rep. 731.

The petition stated, that the plaintiff is a slave of Nicholas Lauve; that Erasmus Robert Avart made his last will, by which he directed, that immediately after his decease, his testamentary executor, the present defendant, should purchase the plaintiff and her child, and afterwards emancipate them according to law; that Nicholas

A slave
may sue for
her free-
dom ano-
ther per-
son than
her master.

Lauve is willing to sell the plaintiff and her child for a reasonable price ; wherefore the plaintiff, in order to obtain her freedom, and that of her child in due time, prays that the defendant be cited to declare, whether he accepts the said executorship, and in case he does, that he may be compelled to fulfil the will of the testator in the premises ; and in case he declines it, some proper and fit person may be appointed in his stead. The defendant pleaded the incapacity of the plaintiff to stand in court, as she was the slave, not of the testator, but of another. The parish court gave judgment, that "the plaintiff be maintained in her right to institute this suit ; that she be declared entitled to obtain her freedom ; and, to this end, that the defendant in this cause be compelled to purchase the plaintiff and her child, as agreed upon by her master, and emancipate them, agreeably to the last will and testament of Erasmus R. Avart, of whom he is executor. And further, that he pay the costs of the suit." From this judgment the defendant appealed.

Per Cur. Martin, J. This action is grounded on the regulations in our civil code which relate to slaves, and particularly that part of them which authorizes them to be parties in civil actions, either as plaintiffs or defendants, when they have to claim or prove their freedom.

The defendant denies the plaintiff's right to sue, because, by her own showing in the petition, she is indisputably the slave of another person, and does not claim freedom directly against the defendant. As she is not opposed by her acknowledged master, we are of opinion that she has a right to maintain her action. But the parish court has erred in deciding definitively in favor of her right to freedom. It is therefore ordered, adjudged, and decreed, that the judgment be annulled, avoided, and reversed, and that the case be sent back with instructions to the judge to hear the parties and decide the case, after an investigation of its merits.

6.

HARRIS v. CLARISSA and others. March T. 1834. 6 Yerger's Tennessee Rep. 227.

This was an action of trespass and false imprisonment, brought by the plaintiffs below to establish their right to freedom. The jury found a verdict in favor of the plaintiffs ; and that the said *Clarissa* and her two youngest children were not slaves. It was contended for the plaintiff in error, that a joint action for false im-

Where a female slave and her children have been held in slavery, they may main-

prisonment could not be sustained, even if all the plaintiff's were capable of suing separately; as it was a several wrong done to each.

Per Cur. Catron, Ch. J. The title of the mother and children standing together, they may sue together for their freedom. 1 Washington's Rep. 233. 239. There is nothing in the objection of misjoinder.

7.

DEMPSEY v. LAWRENCE. June T. 1821. Gilmer's Virginia Rep. 333.

Dempsey was born the slave of one David Wallace, and descended to his son William. He hired himself of his master William Wallace, and having accumulated the sum of \$100, agreed to pay it, and \$200 more at a future day to his master, provided he would emancipate him. The proposal was accepted. After it was accepted, Wallace insisted that Dempsey should find some one to be surety for the payment of the \$200; one Bacon agreed to become bound for the payment, and executed his bond to Wallace. In this state of things, one Lawrence took the place of Bacon, agreed to pay the \$200, and Dempsey was to be bound to him for it. This arrangement was made in concert between Bacon, Wallace, and Lawrence. Dempsey paid the money to Lawrence by instalments. Lawrence then went to North Carolina, and promised Dempsey if he would go with him he would emancipate him. Dempsey went and remained two years; returned, and lived on a piece of land adjoining Lawrence, always acting as a freeman. Lawrence died, and his widow claimed Dempsey as a slave. The bill prayed, that all persons be enjoined from molesting or selling the plaintiff as a slave; and that the widow of Lawrence be decreed to execute a deed of emancipation. The defendant (the widow of Lawrence) never answered the bill, and Dempsey's counsel asked a final decree. Chancellor Nelson was willing to continue the injunction until Dempsey could assert his freedom in a regular manner in a court of law; but it being insisted that he should make a final decree, he dissolved the injunction, and dismissed the bill; and an appeal was taken.

By the Court. The court of chancery had jurisdiction of the case, and might have proceeded to a final decree, after the proper preliminary steps; it might have assigned counsel to the appellant, and have conformed to the other provisions of the act prescribing the mode of conducting suit for freedom. The decree is there-

tain a joint action to establish their freedom.

The chancery, as well as common law courts have jurisdiction in suits of paupers for freedom; and will, on a case proper for a court of equity, appoint counsel to prosecute for the pauper.

fore reversed, and the cause is to be sent back to the chancery court of Williamsburgh, with directions to the court to appoint counsel for the appellant, and to proceed to a final decree on the merits.

(B.) OF EVIDENCE.

1.

MARY v. MORRIS et al. Aug. T. 1834. 7 Louisiana Rep. 135.

In a suit for freedom the *onus probandi* lies on the plaintiff if he be black.

Held by the court, that in a suit for freedom, when the question is *libera vel non*, and the plaintiff being from color, and in the actual possession of the defendant, is presumed to be a slave, the burden of proving her freedom devolved on her.

2.

FOX v. LAMBSON. May T. 1826. 3 Halst. Rep. 275.

So in New-Jersey.

Per Cur. Ewing, Ch. J. It is a settled rule in our courts, on questions of evidence, that the black color is proof of slavery; *Gibbons v. Morse*, 2 Halst. Rep. 264.; which must be overcome before the witness can be received.

3.

FOX v. LAMBSON. May T. 1826. 3 Halst. Rep. 275.

But the presumption may be rebutted.

Held by the court, that where a person was reputed to be free, and for more than 20 years had been in the full and actual enjoyment of freedom, is sufficient evidence to overcome the presumption of slavery arising from color.

4.

HUDGINS v. WRIGHTS. Nov. T. 1806. 1 Hen. and Munf. 134.

Onus probandi, on whom it lies.

Appeal from the high court of chancery. The complainants in their bill asserted their right to freedom, as having descended in the maternal line from a free Indian woman, called Butterwood Nan. On the hearing, the chancellor perceiving, from his own view, that the youngest of the claimants was perfectly white, and that there were gradual shades of difference of color between the grandmother, mother, and granddaughter, (all of whom were before the court,) and considering the evidence in the cause, determined that they were entitled to their freedom; and, moreover, on the ground that freedom was a birth-right, it was a general principle, that whenever one person claims to hold another in slavery

the *onus probandi* lies on the claimant ; and he decreed in favor of the claimants.

Per Cur. *Tucker, J.* In aid of the other evidence the chancellor decided upon his own view. This with the principles laid down in the decree has been loudly complained of. Nature has stamped upon the African and his descendants two characteristic marks, besides the difference of complexion, which often remain visible long after the characteristic distinction of color either disappears or becomes doubtful : a flat nose and woolly head of hair. The latter of these characteristics disappears the last of all. And so strong an ingredient in the African constitution is this latter character, that it predominates uniformly where the party is in equal degree descended from parents of different complexions, whether whites or Indians, giving to the jet black hair of Indians a degree of flexure which never fails to betray that the party distinguished by it cannot trace his lineage purely from the race of native Americans. Its operation is still more powerful where the mixture happens between persons descended equally from Europeans and African parents. So pointed is this distinction between natives of Africa and the aborigines of America, that a man might as easily mistake the glossy jetty clothing of an American bear for the wool of a black sheep, as the hair of an American Indian for that of an African. Upon these distinctions, as connected with our laws, the burden of proof depends. Upon these distinctions not unfrequently does the evidence given upon trials of such questions depend, as in the present case, where the witnesses concur in assigning the hair of Hannah, the daughter of Butterwood Nan, the long straight black hair of the native aborigines of this country. That such evidence is both admissible and proper, I cannot doubt. That it may sometimes be necessary for a judge to decide upon his own view, I think the following case will evince :

Suppose three persons ; a black or mulatto man or woman with a flat nose and woolly head ; a copper-colored, with long jetty black straight hair ; and one with a fair complexion, brown hair, not woolly, or inclining thereto, with a prominent Roman nose, were brought together before a judge on a *habeas corpus*, on the ground of false imprisonment and detention in slavery ; that the only evidence the person detaining them in his custody could produce was an authenticated bill of sale from another person, and that the parties themselves were unable to produce any other evidence

concerning themselves, whence they came, &c. How must a judge act in such a case? I answer, he must judge from his own view. He must discharge the white person and the Indian out of custody, taking surety, if the circumstances of the case should appear to require it, that they should not depart the state within a reasonable time, that the holder may have an opportunity of asserting and proving them to be lineally descended in the maternal line from a female African slave; and he must redeliver the black or mulatto person with the flat nose and woolly hair to the person claiming to hold him or her as a slave, unless the black person or mulatto could procure some person to be bound for him to produce proof of his descent, in the maternal line, from a free female ancestor. But if no such caution should be required on either side, but the whole case left to the judge, he must deliver the former out of custody, and permit the latter to remain in slavery, until he could produce proof of his right to freedom. This case may show how far the *onus probandi* may be shifted from one party to the other.

5.

HUDGINS v. WRIGHTS. Nov. T. 1896. 1 Hen. & Munf. Rep. 134.

The *onus*,
on whom
it lies.

Per Cur. Tucker, J. All white persons are and ever have been free in this country. If one *evidently white* be, notwithstanding claimed as a slave, the proof lies on the party claiming to make out the other his slave.

Per Roane, J. In the case of a person visibly appearing to be a negro, the presumption is in this country, that he is a slave, and it is incumbent on him to make out his right to freedom; but in the case of a person visibly appearing to be a white man, or an Indian, the presumption is that he is free, and it is necessary for his adversary to show that he is a slave.

6.

JENKINS v. TOM et al. Fall T. 1792. 1 Wash. Rep. 123.

In a suit
for free-
dom, hear-
say evi-
dence is
admissible
to prove
pedigree.

Held by the court, that in a suit for freedom, hearsay evidence is admissible to prove the pedigree of the plaintiff.

7.

WALLS v. HEMSLEY et al. June T. 1817. 4 Har. & Johns.
Rep. 243.

The court held, that the reputation of the neighborhood, that the mother of the petitioner for freedom was a free woman, is not admissible evidence for the plaintiff in a trial for freedom. Nor are the declarations of a person since dead, but at the time holding the mother of the petitioner for freedom in slavery, that she was a slave, admissible evidence.

General reputation, when evidence of freedom.

8.

LEMON v. REYNOLDS, ADM'R of Holmes. April T. 1817. 5 Munf.
Rep. 552.

The court held, that in a suit for freedom the validity of the will under which the plaintiff claims, ought not to be questioned, (the same, or a copy thereof, the original being destroyed,) the will having been admitted to record, as and for the last will and testament by the proper court, whose judgment remains unappealed from; and the validity of such will not being contested by a bill in equity.

The validity of a recorded will under which freedom is claimed cannot be questioned.

9.

VAUGHAN v. PHEBE, a woman of color. Jan. T. 1827. Martin & Yerger's Tennessee Rep. 1.

Phebe sued Vaughan, in the court below, in an action of trespass and false imprisonment. Vaughan pleaded that Phebe was a slave, and his property. To which plea Phebe replied, denying she was a slave, and the property of Vaughan. Upon which replication issue was joined.

Reputation, or hearsay, is admissible evidence of descent from Indian ancestors, and may be used as a part of the claim of proof to establish freedom.

At the trial of the cause in the court below, the plaintiff offered to read in evidence, the depositions of Seth R. Pool, Martha Jones, and Phebe Tucker. The defendant, by his counsel, objected to the competency of the evidence contained in Poole's deposition, and to so much of Martha Jones' and Phebe Tucker's as related to hearsay and information from others. The evidence of Pool, as set out in his deposition is, "that he had been acquainted with Phebe for fifty years, and that she was always said to be of Indian extraction. That he was also acquainted with her mother, called *Beck*, who was also called an *Indian* by descent; and he believes she was the daughter of Moll, the property of Wm. Jones. That Phebe had been deprived of her eye by a ringworm. That *Beck*,

her mother, was sister to Tab, the property of Benjamin Tucker who had always claimed her freedom, *and as he believed had got her freedom by due course of law.* That said Phebe is descended from an *Indian mother*, and was always considered free. That said Benjamin or Littlebury Tucker was sued by Tab, the *maternal aunt* of Phebe, and *sister to Beck*; and she recovered her freedom in consequence of her having descended from an Indian mother, who was free. That he had often heard that *Murene* was the grandmother of *Beck* and *Tab*, and that she, Murene, was remarkably old, and lived about with her children and grand-children, and was always reputed an Indian, and was free. That Murene was a copper color, and that Abner, the brother of Phebe, sued, as he was informed and believed, Thomas Hardeway for his freedom, and was killed by said Hardeway; and that Phebe had often solicited him to undertake to procure her freedom; but from the long acquaintance he had with her master he would not do it." Those parts of the depositions of Martha Jones and Phebe Tucker objected to are, "that they knew many years ago, a colored woman named Phebe, in the possession of Thomas Hardeway of Dinwiddie county, Virginia; she having lost an eye, as was said, by a tetter or ringworm. They also knew *Phebe's mother*, who was named *Beck*. Beck was always said to be sister to Tab, by the mother's side. That they had understood that Phebe was brought to Tennessee by Abraham Vaughan. That *Tab* had obtained her freedom by due course of law, and that they believed all Phebe's relations in those parts had also obtained their freedom upon the plea of their having descended from an *Indian ancestor*. They always understood that Molly Moore, (formerly Evans,) had one of the family named Minor, and several others who had since all got their freedom, as will appear of record.

Per Cur. Crabb, J. The defendant in error brought a suit against the plaintiff in error, in trespass. The plaintiff in error pleaded, that Phebe was a slave, and his property. Whether she was free or a slave was the question. The cause was tried before a circuit judge in Sumner county, and a verdict returned by the jury for Phebe. A judgment was entered, "that the plaintiff recover against the defendant her freedom and the damages," &c. Vaughan prayed an appeal, in the nature of a writ of error, to this court.

At the trial, Vaughan, by his counsel, objected to the reading of the depositions of Seth P. Pool, and so much of those of Martha

Jones and Phebe Tucker, as related to hearsay, or information from others. Some of us have had much difficulty in coming to a conclusion satisfactory to our minds as to some of the points made in this cause. The peculiar value of the right claimed, and the improbability of such a right being successfully asserted in many instances, except by such evidence as that which has been resorted to on this occasion, on the one hand ; and on the other, the want of entire coincidence between what has been heretofore done by judicial tribunals, whose decisions are precedents for this, and what we are now asked to do, added to the imposing character of two decisions, both of which, and one especially, would seem to militate against the introduction of the evidence received in the court below, have been the causes of that difficulty. To the arguments made, the decided cases produced on both sides, and some others, a laborious and anxious examination has been given. It only remains for us to make known some of the considerations that have influenced us, and to announce the result to which we have been conducted, in the best exercise of judgment of which we are capable. We shall not undertake to remark in detail upon either the books or the arguments relied on at the bar. What the circuit said, as to the effect of the evidence, or the purposes for which it was received, or what other testimony was brought forward to support the verdict, does not appear. The questions are, therefore, simply as to the admissibility of the depositions, and the verdict and judgment for any legal purpose. Let the first question be, did the court below err by admitting the depositions ?

That so much of them as relates to pedigree is legal evidence, was admitted by the counsel for Vaughan in argument.

This is certainly a matter of long standing, such as those where courts "from necessity, and on account of the great difficulty of proving remote facts in the ordinary manner by living witnesses," have been in the habit of receiving hearsay and reputation as to pedigree. And I suppose the proof has been made by the best procurable witnesses, taking into view the lapse of time, the removal of the plaintiff below into this from another and distant government, and other circumstances. Such proof is generally expected from members of the family whose genealogy is in question, or others, who from their situation, would be likely to possess the requisite knowledge. A brief examination will manifest, that much more of the offered evidence is covered by the established rule in relation to pedigree, than the counsel for Vaughan seemed to sup-

pose. Take the question of pedigree to be simply a question from what ancestors an individual derived his birth ; which is a much more confined and limited sense than is often practically applied to it. Suppose that Phebe, instead of alleging, as she does in this case, that she is descended from, or, in the language of the witness, has her extraction from a long line of Indian ancestors, had assumed the position, that she was descended from a maternal great grandmother, named A. B., she could not prove this by hearsay, or reputation, after having first established the freedom of A. B., or with the intention of afterwards establishing it ? No one will deny that she could. Why can she not with equal propriety show in the same manner, that she is maternally descended from the Indians of America, after having first shown, or intending otherwise to demonstrate, that those Indians were either all free, or that they were at least *prima facie* to be presumed free ? It may be here remarked, that if Phebe be shown to be descended from Indian ancestors in the maternal line, all doubt will cease as to her being at least *prima facie* free. Had the residence of her ancestors always been in this state, we apprehend the fact of such descent would be conclusive evidence of her freedom.

But her ancestors came, or were brought into Virginia, and the plaintiff below lived in that government until she was some years since brought here. The court of appeals of that state, who must be presumed to have construed their own statutes aright, say, (Hudgins v. Wrights, 1 Hen. & Munf. Rep. 139.) that the act of assembly of Virginia of 1691 repealed the acts of 1679 and 1682. And we heartily concur with them in the opinion, that, although an Indian taken into Virginia, between 1679 and 1691, might be a slave, yet "all American Indians, and their descendants, are *prima facie* free, and that where the fact of their nativity and descent, in a maternal line, is satisfactorily established, the burthen of proof thereafter lies upon the party claiming to hold them as slaves." Let us return to the doctrine of hearsay evidence, in cases of pedigree : hearsay or reputation, under the rule with regard to pedigree, is not confined to the fact of descent from a specified ancestor, or a tribe or nation of ancestors. It may be received to show the truth of another fact, from which such descent can be reasonably inferred. "Thus," says a popular writer on evidence, (Phillip's Ev. 168.) "declarations of deceased members of the family are admissible evidence to prove relationship : as who was

a person's grandfather, or whom he married, or how many children he had, or as to the time of a marriage, or of the birth of a child, and the like, of which it cannot be reasonably presumed that better evidence is to be procured." See Bull. N. P. 294; 3. Starkie's Evidence, 1113. From this examination it appears to us clear, that the circuit court did not err in admitting those parts of the depositions which speak of any of the persons where genealogy is in question, having been called of Indian extraction, "called of Indian descent," &c., which is tantamount to saying, they were commonly reputed to be descended from the Indians, &c. &c. So, also, that the court did not err in receiving the hearsay as to Murene being reputed an Indian, &c.

But these depositions contain statements of the common reputation in the state of Virginia, that some of the persons whose freedom were in question were free. And hence arises the most difficult and embarrassing question: whether, when it becomes necessary to inquire into occurrences of a remote period, common reputation is admissible to prove the right of freedom? From the nature of the remedy provided, and for a long time sanctioned for the enforcement of the right of freedom, there must necessarily often be inquiries into the transactions of remote periods. This remedy, as is well known, is the action of trespass. Whenever necessary to bring suit, there has of course been a continuation of the trespass up to the time or near the time of commencing it. The act of limitations would consequently be no bar. Hence results the necessity of often introducing proof of a kind that would be unusual and unnecessary in ordinary cases. And partly from this cause, this case is assimilated to cases which have been allowed an exemption from the strict rule prohibiting all sorts of hearsay evidence. It may be added, without our intending to give an opinion either way, as to the correctness of the position, that very respectable judges have maintained the broad position, without allusion to the form of action, that length of time does not bar the right of freedom in the same way, and to the same extent, as in other cases. See Judge Roane's opinion, in *Hudgins v. Wrights*, *ubi supra*.

How is an individual in this country, who is unfortunate enough to have a woolly head and a colored skin, to prove that he is free? Not being white, nor copper colored, nor having straight hair and a prominent nose, the presumption probably is, that he is a slave. See *Hudgins v. Wrights*, *ubi supra*. Contrary to the general rule,

he who is charged with having trespassed upon his person, pleads an affirmative plea, and yet need not prove it. He says, in justification of his trespass, that the plaintiff is a slave ; and yet, on that plaintiff is devolved the *onus probandi* to show himself a freeman. How is he to show it ? He may, perhaps, procure testimony that he, or some ancestor, was for some time in the enjoyment of freedom ; that he has acted as a freeman ; that he has been received as a freeman into society ; and very soon will find himself under the necessity of increasing in proportion to the distance he has to travel into time past. for want of other evidence, to use hearsay ; that he, or his ancestor was commonly called a freeman, or commonly reputed a freeman, or, in other words, evidence of common reputation. And why should he not ? Is it a concern of so little moment, that the law in its benignity ought to refuse those aids for its support and protection that have been so exuberantly extended in analogous cases ? Is it of less importance than the right of digging stone upon the waste of the lord of the manor ? *Moorwood v. Wood*, 14 East's Rep. 327. Or the right of the lord to take coals from under the lands of those holding under him ? *Barnes v. Mawson*, 1 Maul. & Selw., 77. Or a right to have a sheepwalk over a piece of land ? 3 Starke's Ev. 1209. Or a right of way over a piece of land ? Bull. N. P. 295. Or to a modus, by which sixpence an acre more should be paid in lieu of small tithes ? *Harwood v. Sims*, Wright's Ex. Rep. 112. These are a few out of many cases. But it is said these rights, franchises, &c., which in England are permitted to be established by hearsay, or common reputation, are, or savor of a public character ; and therefore the public, where this reputation is to be formed, will be more apt to possess a knowledge of their existence, &c. We put it to the candid and the enlightened, whether the right to freedom has not in this respect very much the advantage over many of those rights where such evidence is every day received in the English courts ? Indeed, it is no light matter to be a freeman in these United States.

Freedom in this country is not a mere name—a cheat with which the few gull the many. It is something substantial. It embraces within its comprehensive grasp, all the useful rights of man ; and it makes itself manifest by many privileges, immunities, external public acts. It is not confined in its operations to privacy, or to the domestic circle. It walks abroad in its operations—transfers its possessor, even if he be black, or mulatto, or copper colored, from the kitchen and the cotton field, to the court house and the

election ground, makes him talk of magna charta and the constitution; in some states renders him a politician—brings him acquainted with the leading citizens—busies himself in the political canvass for office—takes him to the ballot box; and, above all, secures to him the enviable and inestimable privilege of trial by jury. Can it be said, that there is nothing of a public nature in a right, that thus, from its necessary operation, places a man in many respects on an equality with the richest, and the greatest, and the best in the land, and brings him in contact with the whole community?

Can it be said, that common reputation is no evidence of a right producing so many effects relative in their character, to that very society where the common understanding, report, or reputation, is required to exist. Can it be said, that the community or neighborhood, as the case may be, the “public” around a man will too readily give credence to a claim, by which the individual who makes it, obtains among themselves so high a comparative elevation? If those around him have interest or prejudice, they will usually be against his claim. It is difficult to suppose a case where common reputation would concede to a man the right of freedom, if his right were a groundless one. If such a case be imagined, it will most probably be an extreme one; and we must bear in mind, that when the evidence we are speaking of is received, it is not regarded as conclusive; it is to be weighed, encountered, and compared with other evidence; and ultimately to have no more effect than, after full examination, the jury shall be disposed to give it. I cannot see how dangerous consequences are likely to result from its admission. Slavery, in our sense of the word, is not known in England. Such a right of franchise, therefore, as an exemption from slavery existing around them, has no place there, and rules with regard to it are unknown to their code. The right to freedom, in this relation, as well as the mode of proceeding for its assertion, is of American growth. Courts cannot be expected to shut their eyes on this important circumstance. Let not gentlemen object, that prescriptive rights are regarded as null in England, or, at farthest, not more than *prima facie* good, unless they have had existence time whereof the memory of man is not to the contrary, and unless the claimant can bring himself within the strict rule as to recent enjoyment; and that, therefore, we ought not to liken the right of freedom to them, as we cannot preserve the parallel throughout. We must ask them to recollect, that we are not relying on cases as to prescription, &c., as *precedents* in this

cause, but that we are endeavoring by analogy to ascertain what is the rule in a *new* case, in a *new* sort of action, as to a *new* sort of right. *Nullum simile est idem* ; or, in the language of the supreme court of the United States, in the case of Nicholls and Webb, we are endeavoring to “adapt the rule of evidence to the actual condition of men,” believing that in this sense it must “expand according to the exigencies of society.” Common reputation may be proved in cases of custom, prescription, &c. It must be reputation as to the right, privilege, franchise, &c., claimed, and not hearsay evidence as to any *particular fact* from which the right, &c., might be inferred ; contrary to what is certainly the rule in cases of pedigree and boundary. They stand in this respect upon different grounds. Peake’s Ev. 13. As in cases of the former kind, it has been said, so I would say in the instance before us, you may prove the right to freedom by common reputation as to the existence of the general right. But you may not introduce any evidence of hearsay, or reputation, as to any particular fact.

The right to freedom is believed not to be a particular fact in the sense in which the latter expression is used in the books. It consists in the exercise and enjoyment of multifarious exemptions, privileges, and rights. In its exercise and enjoyment it produces many particular facts. So far as the cases, produced in *Cranch* and *Wheaton*, vary from the above principle, if they do so, they have not the approbation of our judgments ; and we must dissent from them. The cases cited from Washington, Henning & Munford’s Reports, go strongly to support the view we have taken of the subject ; and we concur with the reasoning of the court in those cases. While, however, we place much reliance on the cases decided in Virginia, we are by no means prepared to subscribe to the correctness of the doctrine urged with earnestness on the part of the defendant in error : that the decisions of the court of Virginia, as they are binding, and demonstrate what the law is there, must be binding here also, this right to freedom having had its origin in that state, and the plaintiff below having had her domicil residence there until lately. Counsel say she would be declared free there ; and, therefore, should be free here.

It is apprehended, that this would be carrying the doctrine of comity between the judicial tribunals of independent states and empires farther than it has ever yet been extended, under the influence of the rules of international law, or the peculiar provisions of

our federal constitution. True it is, that the decisions of the Virginia courts, as to the proper construction of their own statutes, would be unquestioned by any tribunal in any other government. *Elmendorf v. Taylor*, 10 Wheat. Rep. 159.; 6 do., 119.; 5 Cranch's Rep. 234.; 4 do., 428. And so it would be as to their decisions with regard to real property situated there; the universal rule being, that courts are to be governed, as to that sort of property, by the *lex loci rei sitæ*. Vattel's L. of N. and n. b. 2. ch. 8. sec. 103. 110.; 10 Wheat. Rep. 192. 468.; 7 Cranch's Rep. 115. It is equally true, and very notorious too, that contracts are generally to be understood and given effect to, agreeably to the law of the country where made. But it is conceived, that the question here is not within the governance of any one of the foregoing principles. To say that Phebe was free in Virginia, is begging the question. They certainly have no statute which pronounces her free. Whether free or not, would depend upon the finding of a jury as to the fact of freedom. The difficulty is, as to what evidence shall be received to show that she is free; as to what is the true mode of ascertaining facts of a certain character. And that is to be determined by the rules of common law, modified and applied to the actual condition of men and things in this country. On such a subject, courts in Virginia judge for themselves; and courts here are bound to exercise and pronounce their own judgments. There is another point of view in which to place this subject. No doubt the most of the proof in controversy is admissible to show pedigree. Is not the whole of it? When you offer evidence of reputation, as to whether a person at a remote period was free, are you not endeavoring to show that he was descended from free ancestors? Are you not showing his descent? Are you not proving pedigree? At all events, the necessity for the evidence being equal, is not the principle the same, requiring its introduction in both instances. So far, then, as the depositions have allusion to pedigree or common reputation as to freedom, we believe them to be competent evidence. But they contain some statements which are not considered admissible; and in receiving which, we think the court erred. We allude to the evidence of several of the family having recovered their freedom by due course of law, &c. This ought to have been rejected. It would have been better proved by the records themselves. And it

is a maxim of the law of evidence, as true as it is trite, that the best evidence which the nature of the case admits shall be produced.

Upon the whole, we are all of opinion, that the following judgment and directions be entered in this cause : Reverse the judgment and remand it to the circuit court for a new trial, and reject the following words in Poole's deposition, "and that Abner, the brother of Phebe, the plaintiff sued, as he is informed and believes, said Thomas Hardaway, and was killed by him." And to reject the following words in Martha Jones' deposition: "Deponent believes all Phebe's relations in these parts have also obtained theirs, on the plea of their being descended from an Indian ancestor. Has also understood, that one of the same family, named Minor, and several others, have since got free, as will appear of record." And to reject the following words in Phebe Tucker's deposition. "Deponent believes all Phebe's relations in those parts got their freedom on the plea of their being descended from an Indian ancestor; always understood that Molly Moore had one of the family by the name of Minor, and several others, all of whom have obtained their freedom upon the same plea." And to admit the residue of said depositions, and also the verdict and judgment, with the proceedings upon which they were founded, in evidence to the jury.

10.

JENKINS v. TOM. et al. Fall T. 1792. 1 Wash. Rep. 123.; COLEMAN v. DICK AND PAT, 1 Wash. Rep. 233.; HUDGINS v. WRIGHTS, 1 Hen. & Munf. Rep. 134.; PALLAS et al v. HILL, 2 Hen & Munf. Rep. 140.

The *onus probandi* lies on the claimant where an Indian is claimed as a slave.

Held by the court, that when an Indian is claimed as a slave the *onus probandi* is upon the claimant. So, also, where white persons, or native American Indians, or their descendants in the maternal line, are claimed as slaves, it lies on the claimants; but, the rule is reversed where native Africans, or their descendants, are the subjects of the claim.

11.

WELLS v. LANE. May T. 1812. 9 Johns. Rep. 144.

Parol declarations made more than twenty years ago by the owner of a

Lane sued Wells for harboring his slave Betty. Lane, who was a free black man, proved that he purchased Betty and her mother about 24 years ago, and that he married the mother when Betty was about one year old. Lane declared to a witness, that he had

purchased his wife and child from bondage ; that they were received among their society (Quakers) as free persons ; that he had paid a trifling sum for them, because he had purchased them from bondage into freedom. He knew that neither slaves nor slaveholders could be admitted into the society ; and while the plaintiff and his family were in the society, they were considered as children, and not as slaves. Verdict for plaintiff.

slave that he purchased her to make her free, and that he meant her to be freed, were held to be evidence of a manumission.

Per Cur. By the statute of 1788 it is declared, that if any person shall, by last will, or *otherwise*, manumit, &c. It would not be giving the provision of the law its due effect to consider no manumission valid unless it was in writing. And if parol manumissions were binding under the statute, the plaintiff's declarations fully show that he never considered Betty as his slave, nor did he purchase her as such. Judgment reversed.

12.

PHILLIS v. GENTIN. March T. 1836. 9 Louisiana Rep. 208.

In a suit for freedom, the plaintiff, a black woman, alleged, that she was born free in Pennsylvania, and that she is now held in slavery by the defendant. The defendant alleged, that he bought the plaintiff by public or notarial act, &c. It appeared in evidence, that the plaintiff was bound an indented servant in Philadelphia, to serve until she was 28 years of age, and that her master sold her, and she was taken to Pittsburg, and afterwards to Louisville ; and where she was sold to others, and finally was bought by the defendant.

A statu libera in Pennsylvania, and past the age at which she is to be free, cannot be held in slavery in Louisiana.

The court observed : " There is no evidence that she was born free ; but the person in whose possession we first find her, held her as a person indented to service till 28 years of age, which has elapsed. She was in like manner held as an indented servant by Bakewell, Zuma, and Sulton, successively. She also resided with Zuma in Ohio, a state where slavery never has existed. This fact, according to the principle to that effect established in the case of Forsyth et al. v. Nash, 4 Martin's Rep., would entitle the plaintiff to her liberty. If the plaintiff was an indented servant in the hands of Page, Bakewell, Zuma, and Sulton, it is not seen how she could afterwards become a slave. The plaintiff and her children are entitled to a decree for their freedom." The defendant appealed.

By the court, *Mathews, J.* It is ordered, adjudged, and decreed, that the judgment of the district court be affirmed.

13.

SCOTT v. WILLIAMS. June T. 1828. 1 Devereaux's North Carolina Rep. 376.

In questions of slavery or freedom, a presumption of slavery arises from a black complexion, but none from that of a mulatto.*

The plaintiff declared in trespass for an assault and battery and false imprisonment; the object of the suit being to ascertain whether the plaintiff, a negro held in slavery by the defendant, was not in truth free. On the trial, the plaintiff proved that he was the son of *Jemima*, who was the daughter of *Jane Scott*; and the question was, whether *Jane Scott* was a free woman. Contradictory statements of her color were given; but the plaintiff introduced an indenture whereby *Jemima* was bound to the father of the defendant, as a free girl of color. The plaintiff was given as a slave by the defendant's father to him, and resided with, and served the defendant from the time of the gift to that of the trial. His honor, the judge below, instructed the jury, that the first question for them was, whether *Jane Scott* was a free woman. And in ascertaining that fact, her color might enter into their consideration. If she was of a black African complexion, they might presume, from that fact, that she was a slave; if she was of a yellow complexion, no presumption of slavery arose from her color. The defendant appealed.

Per Cur. Hall, J. How far the charge of the judge in this case will admit of verbal criticism, is not my province to inquire; but that it is plain and perspicuous, so as to be readily comprehended by the jury, I think there can be but little doubt. They were told that they *might* consider whether *Jane Scott* was of a black complexion. If she was, they *might* presume from that fact that she was a slave; if she was of a yellow complexion, no presumption of slavery could arise from her color. This part of the charge has been found fault with in argument, because the jury were not instructed that they *must* presume that *Jane Scott* was a slave, if she was of a black complexion. The judge, to be sure, in more harsh dictatorial terms might have done so; but I think the differ-

* It is a general rule in all the states where slavery exists, that every negro is to be presumed a slave. In addition to the cases abridged, *Gibbons v. Morse*, 2 Halst. Rep. 253; *Davis v. Curry*, 2 Bibb's Rep. 238. But this rule is qualified in North Carolina, and is confined to the black color, and does not extend to the mixed blood, mulattoes, mestizoes, &c. *Gobu v. Gobu*, 1 Taylor's Rep. 164; 2 Hayw. Rep. 170. See 2 Brevard's Dig. 235; Mississippi Rev. Code 376; Laws of Maryland, act of 1715.

ence would be verbal rather than substantial. When they were told that no presumption *could* arise from a yellow complexion, they must have understood the judge to mean, that a presumption of slavery *must* arise from a black one. I think there is nothing solid in the objection.

14.

MAHONEY v. ASHTON. Oct. T. 1797. 4 Har. & M'Hen. Rep. 63.

On a trial for freedom the deposition of Henry Davis was read, in which he stated, that he had heard his uncle, David Davis, (who is deceased,) say, that it was the report of the neighborhood that if she, Joice, (meaning the ancestor of the petitioner,) had had justice done her, she ought to have been free; and this he heard sundry times from his uncle when talking the matter over. The counsel for the defendant objected to reading the evidence to the jury.

Report of the neighborhood that the ancestor of the petitioner was entitled to freedom is proper testimony in favor of the petitioner.

The court, *Chase*, Ch. J., overruled the objection, and determined it should be given to the jury.

15.

PEGRAM v. ISABELL. March T. 1808. 2 Hen. & Munf. Rep. 193.; S. C. 1 Hen. & Munf. 387.; SHELTON v. BARBOUR, 2 Wash. Rep. 64.; LEE, ex'r of DANIEL, v. COOKE, 1 Wash. Rep. 306.; HUDGINS v. WRIGHTS, 1 Hen. & Munf. 134.

This was an issue, whether the complainant was a free person or a slave. The ground on which the complainant claimed her freedom was, that she was descended from an Indian, who had been imported in this country under such circumstances as would not justify her detention in slavery; and on which ground her mother Nanny had recovered her freedom of one Mayes, her master. The verdict and judgment of the court in favor of Nanny, the mother of the plaintiff, was given in evidence. Verdict for the complainant, and the defendant appealed to this court.

The offspring may give in evidence the record of the judgment in another suit in favor of the mother in a trial for freedom.

The court, *Tucker*, *Roane*, and *Fleming*, J's., held, that the record of the verdict and judgment upon a writ of inquiry, in a suit by the mother of the plaintiff against a third person, in which record the *ground* of the judgment does not appear, may be given in evidence to prove that the mother *had recovered her freedom*; not that she was entitled to it "by reason of being descended in the maternal line from an Indian ancestor imported into this state since the year 1705:" but the question on *what ground* the judgment in that

suit was rendered, and whether the defendant was born after the mother acquired her right to freedom or not, ought to be left open.

Per Tucker, J. How far a verdict *inter alias* is admissible, either as *conclusive*, or only as *presumptive* evidence in suits respecting freedom, I think may be shown by the following case: a female held in slavery recovers her freedom by judgment in the court of one county or district; she removes to another county or district, without a certificate of her freedom; is taken up as a runaway; advertised and sold as such under the act concerning runaways. She brings another suit for her freedom against her new master. Can it be required of her to do more than to produce the former record of her recovery, with an averment that she is the same person?—I conceive not; and that such record is conclusive against all the world, unless the judgment can be impeached by a person whose title was *antecedent* to the recovery, on the ground of fraud and collusion between herself and the defendant against whom she had recovered, or whose title was paramount to that of the defendant, and who would not have been barred by the act of limitations, if he had brought an action of detinue for her as his slave. Now, let us suppose, that at the time she was apprehended as a runaway, and sold, she had a child with her, who should also be sold as a slave, would it not be competent for this child to produce the record of the mother's recovery, and aver that she was born after the commencement of the suit, or the day of the writ purchased. And if she proved this, would not the record be *conclusive evidence* in her favor against all the world, except as before mentioned. And if it would be conclusive evidence in that case, as I hold it would, could she not avail herself of that record as circumstantial evidence, to prove her right to freedom, under a prior right thereto, in her mother, if the child should happen to be born *before*, instead of after the writ purchased in that suit? I am decidedly of that opinion also. For if the child be let in to prove the fact that her mother was a free woman by hearsay testimony, ought she not to be let in to prove it by a *judgment*? I am of opinion that the record may be admitted as evidence; that Nanny, one of the plaintiffs in that suit, was a free woman, or entitled to her freedom on the day of the emanation of the writ in that suit; leaving it open to both parties to show upon what ground that judgment was rendered; and also, whether the present plaintiff was born before or after the emanation of the writ in that suit.

(C.) OF THE DAMAGES.

1.

PHILLIS V. GENTIN. March T. 1836. 9 Louisiana Rep. 208.

Phillis was a *statu libera* in Pennsylvania, to serve until she was 28 years. She was transferred to and from various persons, until the defendant brought her from a person claiming her as a slave for life. Damages for illegally holding a person in slavery.

The 28 years having expired, and the woman having been taken to Ohio, where slavery is not tolerated, the court declared her free. And as to the damages, they observed, "we think they ought not to be allowed against the defendant, or any of the warrantors, except the vendor, who first violated their rights by selling her as a slave for life; he would be liable to vindictive damages in a suit regularly brought for that purpose. The others, who have had her in their possession, appear to have been possessors in good faith."

2.

PLEASANTS V. PLEASANTS. April T. 1800. 2 Call's Rep. 350.

Held by the court, that negroes and mulattoes, recovering freedom, are not entitled to damages for detention, or to an account of the profits of their labor, while held in slavery. Ibid.

3.

THOMPSON V. WILMOT. Spring T. 1809. 1 Bibb's Rep. 422.

Held by the court, Bibb, Ch. J., that where the defendant has reasonable ground to believe the person in servitude is his slave, only nominal damages would be given for the detention; but where the party held a negro in servitude after the period at which he himself contracted to emancipate him, actual damages were decreed. Nominal damages only will be given where the defendant had reasonable ground to believe the plaintiff to be his slave.

4.

MATILDA V. CRENSHAW. March T. 1833. 4 Yerger's Tenn. Rep. 299.

This was an action of trespass, brought by the plaintiff, Matilda, against the defendant. The following facts were agreed on: That on the 15th of June, 1825, and long before, the defendant held the plaintiff to labor as his slave; on that day she sued out her writ in A person held in slavery, but who has recovered

her freedom, may maintain an action of trespass for her labor and services, whilst she was so held in slavery.

trespass against the defendant, returnable to the succeeding term ; at which term she declared against the defendant for an assault and battery and false imprisonment ; to which the defendant pleaded, that she was his slave. Upon the trial of the issue, the jury found a verdict in favor of the plaintiff, and on the — day of April, 1827, final judgment was rendered in her favor. From the said 15th June, 1825, until said — day of April, 1827, the day on which the judgment was rendered, the defendant continued to hold the plaintiff to labor as his slave. One of the questions in this case was, whether the plaintiff could maintain this action to recover damages for detention during the pendency of the original suit, and prior to its determination. It was agreed, that if, upon the facts, the court should be of opinion that the plaintiff should be entitled to recover, judgment should be entered for her for the sum of \$20 per annum, for so long a time as the court should be of opinion the defendant was liable.

Per Cur. Catron, Ch. J. Can a person holden in slavery, but who by a suit has established her right to freedom, bring a second suit to recover for profits produced by her labor to him who held her as a slave ? Is the first suit, in which nominal damages were recovered, an estoppel to a second recovery ? Both the actions are in trespass *vi et armis*. But the first for freedom tries the title, as an ejectment in cases of land ; slave or no slave, is the issue, which has never been holden in this state to involve the question of hire. We borrowed the form of action from our sister states, especially Virginia, where the same rule of practice prevails. *Pleasants v. Pleasants*, 2 Call's Rep. 277. 293. 299. That the slave cannot sue the master, is a general rule. A suit for freedom tries the fact, whether the plaintiff is a slave. This, established by a verdict and judgment, concludes the defendant to the suit for freedom from controverting the right, as in cases of ejectment, where trespass *quare clausum fregit* is brought to recover mesne. Bull. N. P., 87. But the judgment in the freedom suit will only relate to its commencement, and estop the defendant to that time ; if wages and damages for previous time, and because of previous abuse are claimed, the controversy will again result in one of title. This is in analogy to the rent for mesne profits of land, in which case the recovery in ejectment is conclusive evidence of title from and after the commencement of the action ; before the right has not been adjudged Bull. N. P. 87.; Adam's 333, 4, 5. The defendant, Crenshaw, being estopped to controvert the freedom of Matilda, or to say he rightfully held her to service from and after

the commencement of the suit for title, and her capacity to sue having been established; the next question is, how much can she recover? From the 15th of June, 1825, to the — day of April, 1827, she is entitled to recover at the rate of \$20 per annum.

5.

MATILDA v. CRENSHAW. March T. 1833. 4 Yerger's Tenn. Rep. 299.

Trespass.

Matilda, the plaintiff, having, in a former suit against the defendant, established her right to freedom, brought this action to recover wages during the pendency of the original suit, and up to final judgment; the defendant having continued to hold her as his slave.

Money which the plaintiff has necessarily expended in establishing his claim to freedom, as attorney's fees, &c., is recoverable.

Per Cur. Catron, Ch. J. Matilda spent fifty dollars in prosecuting her suit for freedom. It is admitted the expense was necessary. Can this be recovered in the present action? Nothing is better settled than that things may be laid in aggravation of damages, and that the whole damage sustained by the *tort*, may be recovered in actions of trespass *vi et armis*, or trespass *quare clausum fregit*. Bull. N. P., 21. 89.; Adam's 332, 3. The fifty dollars will be added to the wages.

(D.) OF THE JUDGMENT.

1.

ALEXANDER v. STOKELY. Sept. T. 1821. 7 Serg. & Rawle's Rep. 299. **S. P. SHELTON v. BARBOUR,** 2 Wash. Rep. 64.; **PEGRAM v. ISABELL,** 2 Hen. & Munf. 193.

Homine replegiando, brought by Susannah Stokely against Alexander, to try the right of the plaintiff to the services of a negro girl called Nance. The record of a judgment of the court, in a case where Milley, the mother of Nance, was complainant, and Mrs. Stokely defendant, and where the court found Milley a free person, and not a slave, was offered in evidence. The evidence was objected to, and rejected by the court.

A judgment of freedom in favor of the mother is conclusive evidence against the defendant, or one claiming a child of the mother born after the judgment.

Per Cur. Nance was born after her mother became a free woman; and the question is, whether Susannah Stokely is estopped by this judgment from now averring contrary to the title thus found that Milley was her slave. I do not propose the question,

whether it is evidence to go to the jury, on the issue on trial, but on the ground of its conclusiveness. *A recovery in any suit upon issue joined, on matter of title, is conclusive on the subject matter of title.* An allegation on record, upon which issue has been once taken and found, is, between the parties taking it and their privies, conclusive according to the finding thereof, so as to estop the parties, respectively, from again litigating that fact once so tried and found. Now, nothing can be clearer than this, that the children are privies in blood to their mother; and so far as it regards the state of the mother, whether a slave or free at the time of their birth, are privies in estate. It is unnecessary to decide, whether children would be bound by judgment against their mother on a question of their freedom; yet, even to support that doctrine, there is very high authority.

In the case of a child claiming to be free, because the mother in a suit wherein the same person was a party claiming the services of both, was adjudged free, on an allegation appearing on the record precisely found that the mother was free when the child was born, I can entertain no doubt but on principles of reason and authority, the judgment is conclusive as to the freedom of the child. The first step the defendant must take, would be to prove, that the mother was a slave; *partus sequitur ventrem*. The child is born free according to the condition of the mother; and if an action wherein the person claiming the services of the child is one party, and the mother is the other party, she has been declared free by the judgment of a court of competent jurisdiction, that matter cannot again be called in question. The child with the record in his hand cannot be held in slavery or servitude. There is an end to the question as to the mother. The condition of the mother is changed, and it would shake our understandings, if the law were so that a child whose mother by law had been free before her birth should, notwithstanding, be born a servant or slave. In all personal actions concerning goods, chattels, and debts, a recovery in one action is a bar in another, and there is an end of the controversy. Coke's Preface to his Eighth Reports. The judgment, which is the fruit of the action concludes the existence of the right. If this child had been born after the judgment in favor of the mother, it could not be pretended that the plaintiff below could retain her as a servant; yet this judgment has relation to the condition of the mother when the child was born, which has been conclusively settled to be that of a free woman.

The judgment is final for its own proper use and object; and is conclusive on its subject, by way of bar to future litigation, for the thing thereby decided. The judgment was on the very right to hold the mother in slavery. That judgment was, that she ceased to be a slave long before the birth of this child. That was the immediate right in demand: the whole right of the plaintiff in this action hung on that inquiry. She claimed by and through the mother.

Freedom or slavery of the mother was the substantial matter in issue in both suits. A case in the Year Book, 13th Ed. IV. 2, 3, 4, comes up to this. It was trespass for taking a villein. The ancestor of the villein had answered in a former suit, in which it had been alleged, that he was a villein regardant; that he was free, and not a villein in manner and form as alleged; and it was so found. The son of the supposed villein relied on this finding as an estoppel; and it was held so.

The court erred in not admitting this evidence. It was not only relevant, but conclusive. Strictly speaking, as the former judgment was not pleaded, it may not be considered a legal estoppel; yet it was conclusive in evidence on the right of these parties.

2

VAUGHAN v. PHEBE, a woman of color. Jan. T. 1827. Martin & Yerger's Tennessee Rep. 1.

Phebe sued Vaughan in the court below in an action of trespass and false imprisonment. Vaughan pleaded, that Phebe was a slave, and his property. To which plea Phebe replied, denying she was a slave, and the property of Vaughan. Upon which replication issue was joined. At the trial in the court below, the plaintiff offered to read to the jury the record of a verdict and judgment of the superior court of Prince George county, (Virginia,) in the suit of Tab et. al. v. Littlebury Tucker, which record established the fact, that Tab had in that suit recovered her freedom, on account of her descent from *Indian ancestry*. *Tab proved to be the maternal aunt of the plaintiff*. The defendant objected to the admission of this record as evidence; but the court overruled his objection, and the record was read to the jury. To which opinion of the court the defendant excepted.

A judgment in favor of the freedom of a maternal aunt of the plaintiff on account of her descent from Indian ancestors, may be received in evidence in a suit for freedom, so far as to show the prevailing reputation of the existence of the right claimed.

Per Cur. Crabb, J. Did the court err by receiving the verdict and judgment in the suit of Tab and others v. Tucker? That was

a suit by Tab for her freedom. She obtained a judgment in her favor on the ground that she was descended from Indian ancestors, as appears from the record. Tab was the maternal sister of Beck, who was the mother of Phebe. We think that hearsay evidence, that the maternal sister of one of Phebe's ancestors was always reputed to have been descended from Indian ancestors, or that she was reputed to be free, as having been descended from Indian ancestors, would be some evidence, in a case of pedigree, to show that Phebe also was descended from the same. And, therefore, we consider the solemn verdict of a jury, upon proofs produced to them many years ago, and with the judgment of the court upon it, full as good evidence, to say the least of it, of what was considered the truth in those days.

We do not consider the question as to the introduction, for any purpose of verdicts between others than parties and privies, as involved in the determination of this case in any manner whatever. Nor is any opinion given as to the admissibility of judgments, except in the single case of a verdict and judgment offered, as hearsay evidence in a case of pedigree, as in the case before us. Such a verdict and judgment was held to be admissible by the court of appeals in Virginia, in *Pegram v. Isabel*, 2 Hen. & Munf. 193.; and we believe properly.

3.

SYLVIA and PHILLIS, by next friend, v. COVEY. March T. 1833.

4 Yerger's Tennessee Rep. 297.

A. and B., persons of color, filed their bill, alleging that they had instituted suits for freedom; that they were apprehensive the defendant would carry them out of the state, and sell them, and praying that he be restrained; and also for an attachment

This was a bill filed by the plaintiffs, who are people of color, alleging they have instituted a suit for freedom, and that they are apprehensive that the defendant will convey them away and sell them; and they pray that he be restrained, and that they be taken out of his hands, &c. An attachment was awarded, by virtue of which the plaintiffs were taken out of the custody of the defendant. To this bill the defendant demurred, relying for cause principally upon the ground that the act of 1817, ch. 103., had provided the plaintiff a remedy. The circuit court sustained the demurrer, dismissed the bill, and taxed Myrick, the next friend, with all the costs.

Per Cur. Green, J. The court erred in allowing the defendant's demurrer. The act of 1817, authorizing the court in which the suit for freedom may be pending, or a judge, or a justice in vacation, to make an order requiring a defendant to give security, or, on failure, requiring the sheriff to take and keep the plaintiff in his

custody, does not take away the jurisdiction of a court of chancery in such a case. See 1 Ten. Rep. 478. ; 2 Bro. C. C. 218. ; 2 Wash. Rep. 121. The powers of a court of chancery are more ample than those of a court of law, even under this statute ; and it might often be advisable to file a bill, rather than resort to the remedy provided by the act of 1811. The party may, at his election, resort to either mode of proceeding. Judgment reversed.

to have themselves taken out of his hands, &c. Held, upon demurrer, that the bill ought to be sustained, notwithstanding the act of 1817, ch. 103.

(XXI.) OF THE ACTION TO RECOVER SLAVES.

1.

BASS v. BASS. Feb. T. 1810. 4 Hen. & Munf. 478.

An action of detinue may be maintained for an infant negro child of such a master without any other description.

An action may be sustained without naming the negro.

2.

CALDWELL v. FENWICK. Fall T. 1834. 2 Dana's Rep. 332.

Fenwick sued Caldwell in detinue for two slaves ; one of them, it appeared, was dead before the commencement of the suit. And the question was, whether the action could be maintained for or on account of the slave that was dead.

But will not lie for a slave who died before the action was brought.

Per Cur. Nicholas, J. It seems to us that it cannot. The frame of the action and principles of pleading forbid it. Detinue is a mode of action given for the recovery of a specific thing, and damages for its detention. Though judgment is rendered for the plaintiff for the alternate value, provided the thing cannot be had, yet the recovery of the thing itself is the main object, and inducement to the allowance of the action. The thing sued for has to be specifically described in the writ, declaration, judgment, and execution, that it may be distinguished from other things of the same species. The action is not adapted to the recovery alone of the value of the thing detained ; nor can it be maintained therefor. The alternate judgment for the value is but a mere incident to the judgment for the thing ; nor can it be rightfully rendered, except where there is a judgment for the thing, from which it can result as an incident or consequence. It would seem therefore, to be an indispensable consequence, that there should be a thing sued for. A demand for a dead slave does not fulfil the requirement.

3.

SAUNDERS v. WOODS. March T. 1833. 5 Yerger's Tennessee Rep. 142.

Where the complainant does not make out a clear title to a slave levied upon, a court of chancery will dismiss his bill, and send him to law to prosecute his claim.

The complainant in this case alleges in his bill, that the slave levied upon by the defendant, as the property of his son, belongs to him, and did belong to him at the time of the levy, and prays for a perpetual injunction. The defendant insists that the slave is the property of complainant's son, and was given to him by complainant, and denies that complainant had any right to him when levied on. The proof is conflicting ; several witnesses swearing that the negro was only loaned by complainant to his son to crop with ; several others state facts and circumstances tending to show that it was a gift. The chancellor below dismissed the bill without prejudice to the rights of the complainant at law. From this decision, complainant appealed to this court.

Per Cur. Catron, Ch. J. The reasons why a court of equity does interfere to restrain an officer from selling the slave of one for the debt of another, are stated in the case of *Loftin v. Espey and Thomas*, 4 Yerger's Rep. 84. ; and will not be repeated. But to authorize the complainant to ask the interposition of the injunction powers of the court to restrain the sale, he must show clear, not to say undoubted title in himself. If the title is to be ascertained by the complicated swearing of witnesses, as in this case, and these relations of the respective parties, the court of chancery ought to send the issue of title to a jury, where the witnesses may be seen and heard in person. Now, this might be attained by sending down an issue to be tried out of chancery, holding up the cause in the mean time ; but there is an overruling objection to such course ; it would supercede the action of *deane* to a great extent in all cases of the kind, and fill the courts of equity with the most harassing litigation by way of experiment in advance of sending down the issue. Every case would depend on its own circumstances, whether fit to be sent down ; and it is to be feared would presently result in a general rule, with only occasional exceptions, to send down all cases, in subversion of a tolerably well-settled practice, to bring *detinue* for the slave ; and if there was apprehension he might not be had, file a bill to retain him during the progress of the suit at law ; a practice sanctioned in a case of trespass and false imprisonment for freedom at this term, in *Covey v. Myrick*. Where the right is, therefore, not clearly proved for complainant,

the bill must be dismissed ; which we think was correctly done in this cause, although the complainant shows by his witnesses a strong case, and that it is highly probable he never did give the slave to his son. This proof, however, is much weakened by the evidence on the part of the defendant, making a fit case for a jury, and an unfit one, of course, to be tried by a chancellor. The decree will be affirmed, and the complainant left free to proceed at law. Decree affirmed.

4.

BAKER V. BEASLY. March T. 1833. 4 Yerger's Rep. 570.

This was an action of detinue. The plaintiff declared for two slaves. The jury found for him, and assessed six hundred dollars as the joint value of the two slaves, without severing the value as to each.

In detinue for two slaves the jury should find a separate value as to each, or it will be error.

Per Cur. Catron, Ch. J. Two slaves were sued for. Their value is jointly assessed at six hundred dollars. This is erroneous. 1 Chit. Plead. 122. ; 1 Yerg. Rep. 170. ; 10 Coke's Rep. 119. ; 3 Vin. Sup. 192. ; 2 Starkie's Ev. 495. ; Higginbotham v. Rucker, 2 Cal's Rep. 313. Some of the slaves sued for might be delivered, and others it might be impossible to deliver, because of death, pending the suit. In the nature of things the value of each slave must be assessed. Judgment reversed.

5.

CORNWALL V. TRUSS. March T. 1811. 2 Munf. Rep. 194. ;
HIGGINBOTHAM V. RUCKER, 2 Call's Rep. 313.

In an action of detinue for slaves the jury assessed a gross sum, and judgment was entered on the verdict.

The court reversed the judgment, and remanded the cause, with instructions to ascertain the separate prices of the slaves.

In an action to recover slaves, the jury must assess separate damages.

6.

CHINN AND WIFE V. RESPASS. Fall T. 1824. 1 Monroe's Rep. 25.

Held by the court, *Boyle*, Ch. J., that one joint tenant, or tenant in common, cannot maintain an action against his co-tenant to recover possession of a slave.

One joint tenant cannot maintain an action against his co-tenant to recover slaves.

7.

AUSTIN'S EXECUTOR v. JONES. June T. 1821. Gilmer's Virginia Rep. 341. ; CALDWELL v. FENWICK, 2 Danas' Rep. 333. ; CARROL v. EARLY, 4 Bibb's Rep. 270.

In detinue, the jury having found for the plaintiff the slave mentioned, &c. but that she had died since the suit was brought, the court must nevertheless give judgment for the slave, or for her value; the death not being put in issue by plea puis darrein continuance.

Austin's executor brought detinue against Jones, for several negro slaves by name, and of specified value; among them was one called Beck. The defendant pleaded *non detinet*. There was a verdict for the plaintiff; but the jury found also, that Beck, who was included in the first part of the verdict, died after suit brought, and no damages were given. The court gave judgment for all the slaves but Beck; of her, no mention was made in the judgment. The plaintiff appealed.

Coalter, J. The appellant brought an action of detinue, in the superior court of law for Hanover county, against the appellee, for a negro woman slave, named Beck, of the value of \$400, and for her two sons, Paul, of the value of 400, and John, of the value of \$300. The jury found for the plaintiff the negro Beck, of the value of \$475, Paul, of the value of \$375, and John, of the value of \$300. They then proceed in these words: "We further find the said woman, Beck, has departed this life, since the institution of this suit, to wit, during the present year." They do not find any damages for the detention of either of the slaves. The court gave a judgment, in the usual form, for the negroes, Paul and John; at the bottom of which judgment is this entry: "No judgment being given for the negro woman named Beck in the declaration mentioned, or her value, the jury having found in their said verdict that she has departed this life since the institution of this suit, to wit, during the present year." To this judgment a superseas was awarded.

I, at first, was inclined to be of opinion, that the jury had a right to find the slave Beck for the plaintiff, and to fix a nominal value, at least; and although they had fixed a real value in their verdict, yet there being no motion for a new trial, on the ground that the value was too high, this court might presume it was well ascertained, because the defendant may have sold her for \$475. Although dead, she might be considered as between these parties, to be of that value, and consequently, that the court could give judgment for her, so that the plaintiff might recover her value so ascertained. Had I been confirmed in this opinion, then I should have been for reversing the judgment; and would either have concurred in entering a judgment for Beck, of the value fixed by the jury, or I

would have sent the cause back, with liberty to the appellee to move the court for a new trial ; in order that it might be seen whether there was any such reason, as above supposed, for valuing a dead slave at \$475. If I could have so sent it back, justice, I think, would have required me to do so ; not only because this is a new case, unsettled by any of the courts, but because the jury, in the first part of the verdict, having found this slave for the plaintiff as though she was alive, may have thought it was their duty to value her, as if alive ; and I think it but right to presume, that no such reason, as above supposed, for assessing the value even higher than that laid in the declaration existed, because the court refuse to give judgment for that value, or to say any thing in relation to it which could induce such a supposition.

I had at first doubted, whether it was not an error for the jury to find a greater value than that laid in the declaration ; but I find it otherwise settled in *Bigger's adm'r v. Alderson*, 1 Hen. & Munf. 54. ; in which case the court also expressly says, the value is to be fixed at the time of the verdict. Why ? Because the value may have increased, even beyond the plaintiff's own estimate when he sued ; in fact, the court there say, it is not important that the value should be laid in the declaration, (I presume this is intended after verdict,) because the jury are to fix the real value at the time of the verdict. But if they are to give the plaintiff the increased value at that time, they cannot take an anterior date, so as to fix a greater value on the defendant, when he cannot go back to an anterior date so as to establish a less value. On further reflection and consideration, however, I have come to the conclusion, that in the case of the death or destruction of the property, there can be no verdict or judgment for the specific thing ; but that the regular course would be for the jury, in responding to the whole issue, to find property in the plaintiff, and damages, if any, for the detention, and the death or destruction of the property since the suit, in order to show why the value was not assessed ; and the judgment will be for those damages only, and the costs. If great profits had been received, either by a sale, great hires, or otherwise, by the defendant, I incline to think the jury might give damages for the detention, according to what the defendant had actually received ; but as to the value, the time of ascertaining it is correctly laid down in the case in this court above referred to ; and nothing could justify finding any value as to property dead or destroyed by act of God. Even in case of destruction by act of the party, the

jury can only give redress by way of damages for detention, or privation of property ; for they cannot say that property dead or destroyed is of any value. Suppose the slave had died five years before the verdict found, the suit having been pending a long time, and the jury were asked to assess hires, or damages, for the detention to the date of the verdict ; could not the defendant show that no such hires had been received, for that the negro was dead ?— But say she was not dead, but that five years before the verdict she had, by the visitation of God, become, and had remained so or since a confirmed maniac, and a perpetual expense ; would full hires according to her anterior value be given, down to the date of the verdict ? Could he not show this also as to her value ? or must the jury find her value as before that visitation ? We are not at liberty, nor are the jury, to speculate on the chances that she would not have died, or been thus visited, had she not been detained from the plaintiff ; or that he might have sold her, and laid his money out in other slaves, or lottery tickets, and thereby gained great profits. The whole injury which the law supposes the party to have sustained, down to the verdict, is the reasonable profits to that time : he is to be retributed thus far, by way of damages for detention, and to recover back the property, or its value, at that time ; if the slave has grown up, and become very valuable at that time, then farther to detain, is doing an injury to that amount ; and if the property is not delivered up, the party is retributed for that value, or injury, by the judgment.

If she has become old and infirm, her hires have been diminishing from year to year, and her value now is \$10, though it was an hundred when the suit was brought. Their hires down to the verdict retribute the party for the injury of detention, and the slave or her then value compensates the whole injury.

This is the injury complained of. The slave, or her value, is asked in the declaration, and given by the judgment ; and damages for the detention are also to be settled at the trial. The plea puts these matters, as well as the title of the plaintiff, in issue. If the title only is found for him, the verdict is not sufficient to authorize a judgment in the case, unless it also appears by the verdict that the value could not be assessed. It is as necessary so to assess the value, and damages for detention, as to assess damages in *assumpsit*, where the plea of *non assumpsit* denies, as well the whole debt as the particular amount of damages claimed. The value and damages are equally within the issue in this case ; and evidence is as

necessary to ascertain them to the jury, as to prove the same due in *assumpsit*; and the defendant is equally entitled to show that they are less than claimed, in this case as in that. The plaintiff proves the value of the slave, or the value of her labor at one time; does this preclude the defendant from showing that she was not worth so much at that time? Surely not. Will he be denied the right of proving that she was worth less at a subsequent time, and before the verdict? Surely not: unless the plaintiff has the privilege of fixing the time when she shall be valued; but the law correctly fixes that time at the date of the verdict. Suppose she had not been dead at the time of the verdict, but both her arms had been amputated, could not the defendant give this in evidence on the inquiry as to her value? But it may be said, the jury cannot find that she is dead, for if so, they could give no value, and this would be to abate the suit; for if a plaintiff was to sue for a slave, and state in his declaration that she was dead, a demurrer would lie. Admit the last proposition to be true, yet the death of the slave after the suit could not be pleaded in abatement or bar, any more than payment of an account, or any part of it, after an action of *assumpsit* brought, or the delivery of property after *detinue*. The plaintiff will recover his costs, and also any damages the jury may assess, and such matter will come out on the general issue which general issue involves, as before said, the just retribution to which the plaintiff is then entitled, under the claim in his declaration. But the verdict is for Beck, of the value of \$475. If this value has been ascertained, as the law says it should be, at the time of the verdict, on what principle could the jury find that though she was dead, she was worth that sum? Is not such verdict, upon its face, manifestly repugnant and void? The action of *detinue* is little used in England; and we must be governed by general principles and by analogy to the redress given for similar injuries; and, also, by considering the rights of the defendant after judgment in this particular action. It is laid down in one case, that in *detinue* for charters, if the issue be upon the *detinue*, and it be found that the defendant hath burnt the charters, the judgment shall not be for the charters, for it appears he cannot have them, but he shall recover the value of the land in damages. Rob. Ab. 607.; Bac. Ab. title "*Detinue*," letter B. But the jury found the non-existence of the thing sued for. Regularly, the judgment must be for the thing sued for, if to be had; if not, for the value; but as the verdict showed the thing was not in existence,

though by the act of the party which might have done injury to the value of the land, yet no judgment could be entered for it. The law will not do a vain thing. Here, also, and that too by the act of God, which prejudices no man, the thing no longer exists ; and yet I am asked to enter judgment for it. But the defendant has a right to deliver the property, and is not bound to pay the value. 1 Morg. Vade Mecum, 416. ; Kelw. 646.

If, then, we have a right to enter a judgment for a dead negro, he must have a right to deliver the corps, otherwise he is deprived of the power thus to discharge himself. Surely he could not deliver the corpse ; and yet that is the thing for which we must give judgment on this verdict. We cannot expunge that part of the verdict, though we may set it aside as repugnant, and grant a new trial. But trover will lie, although the property be dead, because the time of the conversion gives the date to which the action relates ; and the very conversion may cause the death of the property. Bac. Ab., Trover, D. E. The recovery in that action amounts to a sale of the property at the time of the conversion, and vests the property in the defendant, *Ib.*, A. ; Stra. 1078., from that time ; so that, if he has sold it even pending the suit, or before, and the plaintiff never gets his damages, he cannot bring detinue against the purchaser. But in case of detinue, the property is never transferred until the alternative value is received. It continues the property of the plaintiff at the time, and after judgment ; and therefore, in this case, if we can suppose property in a dead slave, she was the plaintiff's property at and after the judgment. She was certainly his property when she died. How then can she have died the property of the defendant ? If she died the plaintiff's property, can the defendant be compelled to pay for her, as though she were in full life, and thereby acquire title to her ? Will the law compel him to purchase a dead slave at \$475, when it will not compel him to purchase her at that price if alive, but would allow him to continue the property still in the plaintiff by delivering her to him ?

So, too, in trover ; if the conversion consists altogether in a refusal to deliver on demand, and the thing is then dead, or had been forcibly taken away from the defendant, no action will lie. Bac. Ab., Trover, B. G. 8. And even in trover the party may discharge himself by the delivery of the property, and damages will be assessed accordingly ; but this must be done at, or before trial, and by the assent of the court. If he cannot do this, he

must stand to the loss, as the conversion is the *gist* of the action. Esp. N. P. 596. The most I could do in this case would be to set aside the verdict as imperfect and repugnant on its face ; because it assesses a high value for a slave who is found to be dead ; with instruction to the court to direct the jury, that if they find property in the plaintiff, but that the slave is dead, they must find this last fact specially ; and in that case, only find such damages for the detention, as the plaintiff may be entitled to according to the evidence.

Brooke, J. The question in this case is, whether the finding of the jury, that the slave Beck died after the institution of the suit, is to deprive the plaintiff of his judgment for her value. A correct decision of it will depend on an accurate view of the nature of the action and the pleadings.

The object of the action of detinue is, to recover the specific property detained, or its value, and damages for detention ; it is, like trover, an entire action. Judgment for the defendant is a good bar, in an action of trover, for the same thing. So, a judgment in trover gives the property to the defendant, and is a bar to an action of detinue. It is not denied, that the destruction of the property before trial is no defence in the latter action. In that action, the question is, to whom did the property belong at the time of the conversion ? And its object is, to recover the value thereof in damages. The action of detinue is only a broader action ; substantially, it is the same, with the addition, that the specific property may be recovered, if to be had ; and if not, the alternative value and damages for detention. The alternative is given to meet the accidents that may happen to the property ; which, in trover, would be an unavailing defence. The latter, in England, is most frequently resorted to, because of the wager of law, which would defeat the action of detinue. Under our law, that objection to the action of detinue does not apply ; and it is a valuable remedy, particularly in relation to property in slaves ; and would be abandoned, if the destruction of the property was to defeat it ; the action of trover would be preferred. According to the form of the action of detinue, also, it cannot be maintained for the hire of the property, and damages for its detention only. In both actions, the value of the property must be recovered, or nothing. So, that in this case, if the death of the slave is to avail, the judgment must be for the defendant as to her. No example can be shown, of a judgment in detinue for a personal chattel in which value is omitted. The case from *Roll* of charters, has very little application. The action

for charters is a mixed action ; it partakes of the realty ; there may be summons and severance. In detinue for a chattel, a *capias* lieth ; not so for charters. Co. Litt. 286. But even in that case, the judgment was for the value of the thing, which was substantially the object of the suit. In the absence of all direct precedent, therefore, I infer, even from that case, that no judgment can be rendered in detinue, omitting the value of the property in controversy. An omission to find the value of the slave Beck, in this case, by the jury, would have rendered the verdict imperfect, and no judgment could have been given on it for hire and damages only. The finding, then, by the jury, that the slave Beck was dead, was irrelevant to the issue ; otherwise, a verdict for hire and detention of the property would be a perfect verdict, on the principle, that whatever a jury may find on a special verdict, they will be presumed to have found on a general verdict, if that verdict is questioned. So much for the nature of the action. The pleadings, generally, are the best texts of the law. The plea of *non detinet* traverses the allegations in the declaration, and puts it upon the plaintiff to prove them.

As to the possession in the defendant, that need only be proved, either at the suing out of the writ, or at some time before. In the case of *Barnley, v. Lambert*, 1 Wash. Rep. 308., that was the decision of this court. That decision excludes any other period ; it is not incumbent on the plaintiff to prove possession in the defendant at any after period. Having proved property in himself, and possession in the defendant at or before suing out his writ, and value, the proof of the plaintiff is complete ; and it follows, that any negative proof by the defendant, as to the possession after the writ, would be improper.

But it is contended, that proof of the death of the slave relates to the value, and not to the possession. Is it correct to say, that proof of the non-existence of the thing is proof of its value ? Value is a question of *plus* or *minus*. The inquiry presupposes the existence of the property, and possession in the defendant. It goes to show, that he was not in the possession of the slave Beck at the time of the trial ; that is, that he was not in a condition to deliver her to the plaintiff, which is interdicted by the decision before referred to. The plea relates to the time of suing out the writ, or to some previous period as regards the possession, and not to a time subsequent, according to that decision. Proof, therefore, that the defendant had lost the possession, by death or other-

wise, at a later period, was irrelevant to the issue ; and the jury having found the fact, that finding is mere surplusage : the rule being that *utile per inutile non vitiatur*. For these reasons, I think the judgment erroneous ; that it ought to be reversed, and that judgment should be rendered for the value of the slave who died after the action was commenced.

Roane, J. This was an action of detinue, brought by the appellant, in the superior court, to recover three negroes, stated to be of separate and specified values. Among them is the negro Beck, stated in the declaration to be of the value of \$400. The damages are laid at \$1200. Issue was joined on the plea of *non detinet*. In September 1817, the jury found "for the plaintiff, the negro Beck, of the value of \$475," and the two other negroes at specified values ; but find no damages. They further find, that the negro Beck died "since the institution of this suit," to wit, during the present year. The judgment in the superior court was, that the plaintiff recover the other two negroes, of the values respectively found, if to be had ; and if not, their respective values. No judgment being given for Beck, or her value, the jury having found, that she died since the institution of the suit, in the present year. From this judgment the appellant obtained a supersedeas to this court ; and the question now is, whether the judgment aforesaid, as it omits to give a judgment for the negro Beck, be correct or not. That judgment, as to her, can only be justified, by taking the date of the finding, and not that of the institution of the suit, as the criterion, as well in relation to the right of property itself, as to settling its alternate value. This question is to be decided as upon the present pleadings. I shall enter, therefore, into no inquiry, whether the action will lie for a negro that is dead, at the time of the institution of the suit ; or for one dying after the institution of the suit ; and respecting which, the jury are permitted by the pleadings (if there be such a case) to inquire into that fact, as at such posterior time, and at the date of the verdict. In order to simplify this case, too, I will consider this action as having been brought only for the negro Beck. There can be no difference in principle between that case and the one before us.

It is a general principle of law, that the evidence, the pleadings, and the verdict, all have reference to the time of instituting the suit. Thus, as to the evidence, it was held in 1 Munf. Rep. 22., (*Harrison v. Brocks*,) that an award made after the institution of the suit was not permitted to be given in evidence on the plea of non-as-

sumpsit. As to the pleadings, it was held, in the case of *Smith v. Walker*, 1 Wash. Rep. 135., that the plea of the act of limitations was bad, for referring to the time of the plea, instead of that of the institution of the suit. And a similar plea was held to be bad, and issue joined thereupon immaterial in the case of *Henderson v. Lightfoot*, 1 Call's Rep. 241. As to the verdict, the case of *Burnley v. Lambert*, 1 Wash. Rep. 308., is more than an authority. It not only negatives the idea that the verdict relates to the time of its rendition, but asserts that it has relation, as to the possession, to a time anterior to that of the institution of the action, namely, to the day mentioned in the declaration. It, therefore, goes beyond the point that I have occasion to contend for in the present instance, namely, that of the institution of the suit, and is a full and pointed authority. Mr. Marshall, as counsel for the appellee in that case, while he admitted, that if the property should *perish*, or be disposed of, after the action was brought, the plaintiff might recover the alternative value, (which could not be the alternative value, as at the time of rendering the verdict,) contended, that the time of the institution of the action, and not a prior time, formed the criterion as to the proof of possession. He contended for this on the ground that the plea and declaration were in the present tense, and therefore related to the time of the institution of the suit. The court overruled this argument, by saying, that it proved too much; that it would equally prove that possession must be shown to be in the defendant, not only at the time of issuing the writ, but also at that of rendering the verdict. This decision, therefore, is a clear authority, that notwithstanding the verdict may also use words in the present tense, they do not justify an inquiry into the fact of possession as at that time, but relate to the time put in issue by the pleadings. This idea is farther corroborated by several cases in this court. In the cases of *Newby's Adm'r v. Blakey*, 3 Hen. & Munf. 57; and *Elam v. Bass' Ex'rs*, 4 Munf. Rep. 301.; it was held, that a defendant may protect himself on the plea of *non delinct*, by proof of five years possession of the negroes before the emanation of the writ. If a plaintiff lies by, without bringing a suit, for more than five years, he is not permitted to recover; and the five years vests a title in the defendant. But this inference would be very unjust in relation to a plaintiff who has committed no *laches*; but, on the contrary, has brought his suit within one month after he lost the possession, merely because the time of rendering the verdict was protracted, by the delays of the court and the management of the

defendant, to a longer period than five years from the inception of the defendant's possession. These principles, and these cases, then, clearly prove that the jury were limited by the pleadings, in this case, to the proof of a possession, as at the time of the institution of the suit, and had no right to receive evidence, or find a verdict, touching the non-existence of that possession, as at the time of rendering the verdict. That was a point ulterior to the one made by the pleadings. It was not in issue, and therefore it was irregular to offer evidence in relation to it, or find it by the verdict. If the plaintiff could have foreseen from the pleadings that such evidence would have been offered, he might have repelled that evidence, and the result might, as to the actual death of the negro, have been entirely different. We can, therefore, not know this fact in this case, and are to decide the case as if it were not in the record. That fact is, in truth, not before us, which is precluded by the issue between the parties, and to which the evidence and verdict have been illegally and irregularly extended. We are also to bear in mind, that although the negro is emphatically found to be dead, it is but little more than finding, that she was not in the possession or power of the defendant at the time of rendering the verdict. It is unimportant from what cause this want of possession proceeded, whether from the natural death of the subject sued for, or, for example, by wilful destruction of it by the defendant after the institution of the action. In the last case, it would scarcely be contended, that the defendant should avail himself of his wrong to defeat the plaintiff's action, if this fact were even found by a special verdict.

If this evidence, therefore, ought not to have been received, nor the verdict extended to the present point, what is to be done in the actual case before us? The verdict in question is a general verdict, and not a special one. It is not a special one, because it submits no question of law to the decision of the court. It is not a special verdict, for the further reason, that a jury ought not to submit, in such a verdict, a matter which is not pertinent to the issue, and much less one which is entirely out of that issue. 7 Bac. 4. If the issue relates to the possession, as at the date of the writ, it is entirely foreign to that issue to inquire thereof as at the time of finding the verdict. This verdict, however, is not bad on account of its finding; also this matter, which is not in issue in the cause, after having found the negro in question "for the plaintiff." The finding of that which is within the issue, is not vitiated by finding

that which is not. In such cases *utile per inutile non vitiatur* ; and that which is not within the issue will be rejected as surplusage, the jury having nothing to do with it. 7 Bac. p. 26. Thus, in an action of assumpsit against an executor, on a promise by his testator, and issue was taken on the plea of *non assumpsit*, the jury found for the plaintiff, but they likewise found that the testator was dead before the day on which the promise was alleged to have been made. The verdict was held to be good, and the last part rejected, on the principle of its being surplusage, and not within the issue. 7 Bac. 22. In principle, there is no difference between this case and the one before us. Again, it is a rule, that if the jury find any thing, which is contrary to what is confessed in the pleadings, the verdict, as to so much, is bad, and it is to be rejected as surplusage ; for the jury have nothing to do with what is confessed or admitted by the pleadings. 7 Bac. 41. In the case before us, the pleadings are not only restricted to the date of the writ, as to the fact of possession, but the *existence* of the subject seems admitted. On these pleadings the defendant may object, that he does not detain the negro, but that another man does ; or he may say, that he does not detain the plaintiff's negro, because she is his property, and not that of the plaintiff. But on this issue, it could never for a moment be considered that the existence of the negro was denied. If a tenant in dower pleads, that the demandants did not die seized of the premises, and issue is joined on that plea ; and the jury that he died seized, but further find, that the estate was not liable to dower, the latter part of the verdict is bad, as finding what is virtually confessed by the plea. 7 Bac. 41. Again, it is held that the plea of *non cepit* in replevin, confines the issue to the taking, and allows the property to be in the plaintiff ; and, therefore, no evidence shall be received, or verdict found on this plea, to disprove the property of the plaintiff. 2 Esp. 11. So, in debt on a bond to perform an award made by J. S., the plea was, that J. S. made no such award, and issue ; the jury found J. S. made the award, but also found matter in avoidance thereof ; the last part of the verdict was held to be bad, and was rejected, because it was contrary to the issue. 7 Bac. 41. These cases, by analogy, completely justify a rejection of the last part of the verdict before us, as being contrary to what is put in issue, and is admitted by the pleadings.

The decisions of this court completely show, that the verdicts of juries may be extended by the clerk from the general form in which

they are found. This verdict, so extended, would be, that the defendant does detain the negro in question, and that she is of the value of \$375. The *subsequent* finding of the fact, that she is dead, is clearly repugnant to such extended finding, and is to be rejected. By the first part of the verdict, the jury not only find the result in favor of the plaintiff, but find the fact also which justifies that result, and which is repugnant to, and overrules the latter finding. That complete finding by them, so compounded of law and fact, is not to be varied by any subsequent and irregular finding, on which they have erected no counter conclusion, nor authorized the court to draw one. Such an authority can only be devolved on the court by a special verdict. If this action were brought for this single negro, who had been for years withheld from the plaintiff, and whose hires were considerable; if on the ground in question, the right to the principal subject was defeated, that to the hires or damages could not, I apprehend, be sustained; and yet, this would be a case of extreme hardship, as, at the time of the emanation of the writ, the right to both was perfect. The damages follow as incidental to the recovery, but cannot be obtained, in this action, without it. It has been argued, that you must receive this evidence as at the time of the verdict, because that time is the criterion as to settling the alternative value. This has never been solemnly established by this court, nor would the inference clearly result from it, if it had. In the case of *Bigger's adm'r v. Alderson*, (1 Hen. & Munf. Rep. 54.,) Judge Carrington, indeed, gave this as his opinion, but the other judges were silent on the subject; and the judgment which was given in that case did not affirm this principle. For any thing appearing in that case, the value was settled at an anterior time, and at the time of suing out the writ. As for the English decisions, they are so scanty on the action of detinue, that I can find in them nothing decisive on this point. It is arguing in a circle to say, that unless this be the rule, the plaintiff would get too little for his property. He would so, in relation to a subject of increasing value; but it may be retorted that he would get too much in relation to a subject of a contrary character; and as to a subject of stable value, it is immaterial which rule is to prevail.

If, however, this could be considered as the settled law, in relation to the alternative value, it does not follow that it would attract to it the principal inquiry relative to the possession of the subject itself. It would not change the issue made up between the parties,

as to the right of the property, and which, in terms at least, also extends to the alternative value. In the case of judgment for the negro by default, or on demurrer, and a writ of injury issued thereafter, to ascertain the value, if the time resorted to, as to the last, be that of the verdict, the time in relation to the first is undoubtedly different; it is, at least, that of suffering the judgment, if not that of the date of the writ. I apprehend, therefore, that the position in question is neither shown to be solemnly settled, nor would the inference contended for, clearly result from it, if it were. As for the criterion now contended for, it would destroy the action of detinue altogether, in cases in which the suit is long protracted, and the subject sued for is of a decaying and perishable nature. The ground taken, however, in this opinion, does not extend to cases in which the subsequent death of the negro is relied on, by plea *puis darrein continuance*, or otherwise; and in which the plaintiff had, consequently, an opportunity to contest that point upon the evidence.

If the criterion assumed by the last part of the verdict be sustainable, the plaintiff ought to have an opportunity to be heard upon it. I decide nothing, however, upon that point; I only decide upon the actual case which is now before us, upon the pleadings. As long, therefore, as we are, in rendering our judgment, to respect the *allegata* and *probata* of the parties; as long as we are to shut our eyes against facts which are not known to us upon the pleadings, and are to reject impertinent matter which juries may put into their verdicts, we must decide this case for the appellant. We must so decide it, however the case might be, if, through the laches of the appellant, the slave had been permitted to die before his right had attached by bringing the action. My opinion is, therefore, and such is the opinion of the court, that the judgment of the superior court be reversed, and entered, also, for the slave in question, if to be had, and if not, for her alternative value.

8

EPPEs v. M'LEMORE. Dec. T. 1832. 3. Devereaux's North Carolina Rep. 345.

Where A. agreed to purchase a slave for B., but took the title to himself, and af-

Detinue for a slave. The case was, that the slave in dispute had been the property of the plaintiff's husband, and was sold under an execution against his executor, and bought by one Johnson, who paid the purchase money, and to whom the sheriff returned, he had sold. The only question was, whether the following circumstan-

ces vested the title in the plaintiff, so as to prevent the defendant from taking any thing under a subsequent sale to him by Johnson. The negro had been in possession of the plaintiff before the sale by the sheriff, and directly after it returned to her house. A witness, introduced by the plaintiff, deposed, that before the sale Johnson agreed to purchase the negro for the plaintiff; that after that took place, the plaintiff offered to pay Johnson the price at which he had bought the slave, which he then declined receiving, requesting her to keep it; that at the time this offer was made, the plaintiff had the money in her possession, but it was not produced in consequence of Johnson's wish that the plaintiff should retain it. Upon this point, the evidence was contradictory, and thereupon the counsel for the defendant moved the presiding judge to instruct the jury, that if Johnson purchased the slave at the request, and for the use of the plaintiff, as the slave was bid off and returned by the sheriff as purchased by him, the legal title vested in him, subject only to a trust for the plaintiff, and that the matters deposed to by the plaintiff's witness were not sufficient to vest that legal title in the plaintiff; and further, that the legal title being in Johnson, could not be passed to the plaintiff without a written transfer, or a sale accompanied with a delivery. But his honor refused to give these instructions, and charged the jury, that if they believed that Johnson purchased the slave at the request of, and as the agent of the plaintiff; and delivered the negro to her as her property; that the price bid by Johnson was tendered to him at the time of the delivery, and was not paid because of his request; or, if he was satisfied with the plaintiff's promise to pay him the amount, they were at liberty to find, that there was a valid sale by Johnson to the plaintiff. A verdict was returned for the plaintiff, and the defendant appealed.

terwards, the slave being in the possession of B., the purchase money was tendered by him to A, who declined taking it, but did not disclose his title: held, that the jury were properly instructed, that they might from these facts infer a subsequent sale.

Per Cur. Ruffin, J. I suppose the first instruction prayed on behalf of the defendant to be correct, as far as respects the vesting of the legal title in Johnson, by the purchase in his own name, and his becoming responsible to the sheriff for the price, notwithstanding the previous agency undertaken by him. If he chose to violate his engagement, and to take the title to himself, he might do so. But if he did, that did not prevent a subsequent sale to the plaintiff, and that brings the question to the last part of that instruction, and to the next, as asked for: which is, that the evidence did

not establish a sale from Johnson, or that the legal title passed from him in any way. The court is of opinion that the jury might find that it did. The possession of the slave was transferred to the plaintiff, who offered to pay an ascertained price, which Johnson agreed to accept. It is true, the witness says, this was in reference to the previous agreement of Johnson to buy the negro for the plaintiff; and, therefore, there was then no proposition about the price. But although the plaintiff claimed upon the score of the agency, because she did not know that the purchase had been made in Johnson's own name; yet, when Johnson acquiesced in it, and made the plaintiff believe that she had thus the title in one way, when, in fact, she was getting it in another, the plaintiff's mistake, as to the mode in which it passed, shall not prevent her from acquiring it in any mode, if the acts then done, in their legal operation, passed the title of themselves.

Did the plaintiff and Johnson then consider that the right to the slave was in the former, by virtue of what was before and then done? Was every thing done, that was expected or intended to be done, to vest the title in the plaintiff? and was this followed or accompanied by actual delivery? If so it is a sale. It is an agreement that the property is, or shall be another's, and that agreement consummated by delivery. Suppose Mrs. Eppes had then paid the price, would any body doubt the character of the transaction? Her agreement to pay is the same thing, if taken by the seller in place of the money; and such the witness said was the fact. Upon the conflicting testimony, it was for the jury to determine. Taking that offered by the plaintiff to be true, there was a contract of sale, which accompanied by possession, is an executed contract, and valid. *Choat v. Wright*, 2 Dev. Rep. 289.

9.

KEITH v. JOHNSON et al. Fall T. 1833. 1 Dana's Rep. 604.

In detinue for a slave, a tender of the alternate value will not discharge the judgment, unless the defendant is unable to deliver the specific slave.

Held by the court, that the plaintiff in a judgment in detinue may have an execution issued for the specific slave or thing recovered, and a tender of the alternate value will not discharge the judgment, unless the plaintiff elects to take it, or the court is satisfied, that without the defendant's fault it is beyond his power—the officer must take the *posse comitatus*, if necessary, and seize the slave or thing recovered, and for that purpose he may make

forcible entry into the defendant's dwelling house, if he finds it closed, and has good reason to believe the slave or thing is there.

10.

KENT v. ARMISTEAD. Oct. T. 1813. 4 Munf. Rep. 72.

The court held, that a declaration in detinue for a slave is insufficient to support the action, if it omit to state that the slave belonged to the plaintiff.

The ownership of the slave must be stated.

11.

HOLLADAY AND WIFE v. LITTLEPAGE. March T. 1811. 2 Munf. Rep. 539. ; ROYAL v. EPPES, 2 Munf. Rep. p. 479.

Detinue for a negro woman slave Amy, and her issue, of the value of \$1000, and Rachel, a negro woman slave and her issue, of the value of \$1000. Plea non detinet. Motion in arrest of judgment, on the ground that the declaration was vague and uncertain, in demanding the issue of two negro women therein mentioned. The district court arrested the judgment, and the plaintiff appealed to this court.

And the name.

The president observed, that the court were of opinion, that the omission to state the names of the issue of the female slaves in the declaration mentioned, being, *at most*, only a fact imperfectly stated, and that the judgment of the district court ought to be reversed. The defect is cured by the verdict, which finds the names of the issue of the female slaves in the declaration mentioned.

12.

MUNSEL, ADM'R OF SNEED v. BARTLETT. April T. 1831. 6 J. Marshall's Rep. 20.; S. P. WOODWARD'S HEIRS v. THERLKELD, 1 Marsh. Rep. 10. ; THOMAS v. WHITE et al, 3 Litt. 177.; SNEED v. EWING AND WIFE, 5 J. J. Marshall's Rep. 482.

An heir cannot maintain an action in his own name for the recovery of slaves without the assent of the administrator.

Per Cur. Buckner, J. The law is certainly fully established that an heir cannot maintain an action in his own name for the recovery of slaves belonging to the estate of his ancestor, without having previously obtained the assent of the administrator. They are assets in the hands of the administrator; and for the payment of the debts of the intestate, he may sell them, if it be necessary.

13.

GRIMES v. GRIMES. Spring T. 1812. 2 Bibb's Rep. 594.

But the devisee may without the executor's assent.

Held by the court, *Boyle*, Ch. J., that a devisee of slaves may maintain detinue without the assent of the executor; they being considered real estate.

14.

COX v. EX'RS OF ROBINSON. Fall T. 1809. 1 Bibb's Rep. 604.

No demand other than the writ is necessary to maintain an action for slaves.

Held by the court, *Bibb*, Ch. J., that no demand other than the writ is necessary to maintain the action of detinue. Property in the plaintiff, and possession in the defendant anterior to the suit, are material grounds of this action. *Burnley v. Lambert*, 1 Wash. Rep. 308.; *Crozier v. Gano and wife*, 1 Bibb's Rep. 257.

15.

COX v. EXECUTORS OF ROBINSON. Fall. T. 1809. 1 Bibb's Rep. 604.; STAMPS v. BEATTY, Hard. Rep. 337.

Executors and administrators may maintain an action for slaves.

Per Bibb, Ch. J. Slaves pass to executors and administrators, and they may maintain an action of detinue for them.

(XXII.) OF STEALING AND KIDNAPPING SLAVES.

1.

STATE v. WHYTE AND SADLER. Nov. T. 1819. 2 Nott & M'Cord's Rep. 174.

A slave may be guilty of stealing a slave altho' no force be used.

Prohibition to restrain the defendants, as magistrates, who had convicted a negro man named Billy, for stealing a negro woman named Hannah. The prohibition was moved for, on the ground that stealing a slave by a slave cannot be consummated unless force is employed by the slave charged with the felony, there being no proof of force in this case.

Per Cur. Colcock, J. The act of 1790 expressly declares, that "if any slave shall feloniously steal, take, or carry away, any slave being the property of another, with an intent to carry such slave out of this province, he shall suffer death as a felon." This is one of the charges in the indictment. And as to the objection, that force is necessary to constitute the offence, I think it wholly

untenable. If there never had been any other law upon the subject, I should have said, that to entice a slave to leave his master was a taking and carrying away within the meaning of the act. With inanimate objects of larceny, force may be necessary, and must be used ; but is there any thing in reason or common sense, which requires it as to those subjects of larceny which possess volition and locomotion ? Is not the idea as to both, the deprivation which the owner of the property sustains ? Suppose a horse or a dog to be tolled out of the possession of the owner by force, is not this a taking and carrying away as the shouldering a bale of goods would be ? I confess I can see no substantial legal difference.

2.

THE STATE v. COVINGTON. Jan. T. 1832. 2 Bailey's Rep. 569.

The prisoner was indicted under the statute of 1754, which declares, that any one "who shall inveigle, steal, or carry away, any negro or other slave or slaves, &c., so as the owner or employer of such slave or slaves shall be deprived of the use and benefit of such slave," &c. The owner knew of the contemplated felony, and consented that the negro should meet the prisoner for the purpose of arranging with him the plan of elopement. And the question was, whether the owner was "deprived of the use and benefit of the slave."

The court, *Johnson, J.* after referring to *Macdaniel's case*, 2 East's P. C., 665. ; *Norden's case*, 2 East's P. C., 666. ; and *Eggington's case*, 2 East's P. C., 666. ; which last case was held to be a case in point. There the master of a manufactory had agreed with his servant that the door should be left open for the entrance of the robber ; and when he entered, and took the marked guineas, the servant was with him, and the court held that it was a larceny. The principle will apply to this case. Every act of the prisoner proceeded from his own mere motion, without any agency on the part of the owner of the slave. His not preventing the thing when he knew it beforehand, is not evidence of the assent of his will, but is only an apparent assent. The act was, therefore, *invi-to domino*, and constituted felony.

The consent of the owner of a slave to the slave's acceding to a proposal to be carried off, with a view of detecting the offender in the act of stealing the slave, is not such an assent as will exempt the offender from the penalty of slave stealing.

3.

STATE V. COVINGTON. January T. 1832. 2 Bailey's Rep. 569.;
S. P. STATE V. MILES, 2 Nott & M'Cord's Rep. 4.

Taking a negro a few yards with an intent to inveigle or steal him, satisfies the act, and the felony is complete.

The prisoner was indicted for inveigling and stealing a slave under the act of 1754. It appeared by the testimony, that the prisoner and the negro set out and went the distance of thirty yards in the prosecution of the intent of the prisoner to inveigle the negro from the service and employment of his master, but were prevented from proceeding farther by persons who had placed themselves in ambush to intercept them. The act under which the prisoner was indicted declares, that any one "who shall inveigle, steal, or carry away, any negro, or other slave or slaves, &c.; so as the owner or employer of such slave or slaves shall be deprived of the use and benefit of such slave," &c.

The court, *Martin J.*, held the crime was complete, and that the common law definition applied to prosecutions under the statute as to the *asportavit*.

4.

STATE V. WHYTE & SADLER. Nov. T. 1819. 2 Nott & M'Cord's Rep. 174.

The acts making it felony to steal, &c. negroes, applies to negroes.

The court, *Colcock, J.* The act of 1754, making it felony without benefit of clergy, "to inveigle, steal, or carry away any negro or slave," applies to negroes as well as white persons. His honor observed, that the policy of the country, as well as the express law, makes it necessary that those offences which are declared to be felonies when committed by white men, should also be felonies when committed by negroes. The former acts, which relate to negroes only, made it felony to steal or entice a negro so as to carry him out of the state. This act makes it so to steal or inveigle them, or aid others in doing so, although they be not carried out of the state.

5.

THE STATE OF MISSISSIPPI V. M'GRAW. June T. 1825. Walker's Rep. 208.

An indictment for stealing a negro man not called a slave is insufficient; and

Per Cur. Turner. J. It appears by the record, that at the October term, 1823, of Pike circuit court, the defendant was indicted for stealing a negro man, on which charge he was tried on the plea of not guilty, and acquitted. At the same term he was also indicted for stealing one negro man *slave*, named Emanuel

&c., of the goods and chattels of one William B. Heath, &c. On this arraignment, he pleaded a former acquittal for the same offence, to which the state replied *nul tiel record* of a former acquittal; and the court doubting the law, referred the cause to this court, on the issue of *nul tiel record*. It appears by the record, that the district attorney appeared to enter a *nul pros.* on the first indictment, and informed the prisoner and his counsel, that he considered that indictment invalid, and had preferred another; and submitted to them, whether they would risk a trial on the first indictment; whereupon the prisoner and his counsel would not move to quash the first indictment, but claimed a trial by jury; a trial was had, and verdict for the defendant. I am of opinion that the first indictment was insufficient to warrant a conviction, and on which no sentence could have been passed against the prisoner. It charges the prisoner with having stolen a negro man, no where called a slave in the whole indictment; and it is obvious that the attorney of the state aimed at an indictment, under the statute, for stealing a slave. The authorities summed up in in the first volume of Chitty's Criminal Law, p. 453, &c., show clearly, that a conviction or acquittal on an invalid indictment cannot be pleaded in bar of a second, or subsequent prosecution. Wherefore, let judgment be entered for the state, on the issue joined on the plea of *autor fois acquit*; and it is ordered, that the cause be remanded for further proceedings in the circuit court of said county of Pike.

trial and acquittal on an indictment for stealing a negro man is no bar to a subsequent prosecution for stealing a negro man slave.

6.

COMMONWEALTH V. PEAS. July T. 1834. 4 Leigh's Rep. 692.

Indictment under the statute, 1 Rev. Code, ch. 3. § 30., which declares, that "whomsoever shall carry, or cause to be carried, any slave or slaves out of this commonwealth, shall carry or cause to be carried any slave or slaves out of any county or corporation within this commonwealth, in any other county or corporation within the same, without the consent of the owner or owners of such slave or slaves, or of the guardian of such owner or owners, if she or they be a minor or minors, and with intention to deprive such owner or owners of such slave or slaves, shall be adjudged guilty of felony."

An indictment on the statute for feloniously taking and removing a slave, must aver that the slave was taken and removed without the consent of the owner.

The indictment omitted to aver the carrying out of the county was without the consent of the owner. The jury found the prisoner guilty. Motion in arrest of judgment.

Per Cur. Lomax, J. The omission of the averment, that it was without the consent of the owner that the slave was removed, is a fatal defect, and is not cured by verdict. Judgment arrested.

(XXIII.) PENALTIES FOR TRADING WITH, &c.

1.

DELERY v. MORNET. Feb. T. 1822. 11 Martin's Louisiana Rep. 4.

It is no defence in a suit on the part of the Black Code, which forbids the sale of spirituous liquors to slaves, &c. that the defendant did not know the negro to be a slave.

Porter, J. This action was instituted in virtue of the 24th section of the *Black Code*, (1 Martin's Dig. 622.,) which enacts, that "intoxicating liquors shall not be sold to slaves without a written permission from their master; and declares, that any person violating that provision shall incur a penalty; and, moreover, be answerable to the owner for all damages which the master may suffer in consequence thereof." The petition alleges, that the defendant did, in violation of this law, sell to the slave, *Jasmin*, spirituous liquors; that by the cause of them he became intoxicated; and that in consequence of said intoxication, he was drowned. The defendant denied that he was liable, by reasons of the allegations in the petition, and concluded his answer by putting the plaintiff on the strict proof of every thing necessary to support his action. There was judgment against him, and he appealed. The defence has been presented to us in argument, under the following divisions—

1. That it is not proved that the illegal act complained of was done, knowingly, by the defendant.

2. That the evidence does not prove that the slave became intoxicated at the house of the defendant, and in consequence of the spirituous liquors he drank there.

That the damages suffered by the master must be the direct and immediate consequence of the intoxication of the slave, and that, in the present instance, the evidence does not establish that fact.

1. The evidence proves clearly, that the defendant sold liquor to the slave of the plaintiff, and this is sufficient to throw the burthen of proof on the defendant, that the act was done innocently. Were we to require that the master, in an action of this

kind, should prove that the seller of liquor knew the individual to whom he sold it to was a slave, we would require evidence that, from the nature of the transaction it is impossible, in many cases, he could give, and defeat entirely the object of the statute. The general rule is, that the burthen of proof lies on the person who has to support his case by proof of a fact, of which he is supposed to be cognisant. Phillip's Ev. (edit. 1820,) 150.

2. The principal witness swears, that he embarked at the market house in a pirogue, with the slave *Jasmin* and some other negroes; that they (the negroes) were sober when they set off; that when they came opposite the defendant's residence they put to shore, went into his house, purchased liquor, drank it, remained there a quarter of an hour, and that they began to quarrel and fight as soon as they re-embarked; that *Jasmin* was drunk, and that a short time after, he was drowned. This proof is satisfactory to my mind, as it appears to have been to that of the judge who tried the cause, that the intoxication of the slave proceeded from the liquors procured and drank at the defendant's shop. The third and last point is the only one which has presented any difficulty. The defendant insists, that the death of the slave was not the direct consequence of the intoxication; but resulted from the act of a third party threatening to flog him. On this head the evidence is as follows: J. Soule, the witness who embarked in the pirogue with the slave *Jasmin*, swears, that after they left the shop of the defendant, and embarked on board the pirogue, the negroes began to quarrel, and finally to fight; that one of them fell twice into the river; that he (the defendant) finding his situation a dangerous one, called for help from a boat he saw at some distance, and that a Mr. Lartigue came to his assistance, and brought the pirogue to land. When they got on shore, Mr. Lartigue observed, that he would give them a flogging, and then they would behave themselves. On hearing this, *Jasmin* jumped into the river, the witness jumped after him, but was unable to save his life. Another of the negroes, who was also drunk, immediately endeavored to drown himself, but was prevented. Lartigue confirms this testimony, except that his declaration to the negroes was, that if they did not behave themselves he would correct them.

This evidence shows, in a most striking point of view, the consequences that result from violating a wise and salutary law, which is founded alike on a regard for the interests of the master and slave. And the judgment of this court can only enable the defendant

to discharge one of the responsibilities which he has incurred by this transgression. The defence which he sets up cannot, in my opinion, be sustained. The bad conduct of the negroes in the boat was the result of his act; the necessity of approaching Lartigue was caused by it; and the justifiable threat of correction arose from the intoxication of the slaves, which we have already seen, proceeded from a fault of the defendant. The case cited from Taunton's Reports is not law here; and the reasons given by the judges who decided it are not satisfactory. It appears very strange that a man should be excused from the consequences of illegally frightening the horse of a traveller, because the driver was not skilful, when it is clear there would not have existed a necessity for exercising skill had it not been for the act of the defendant, and but for that act, no damage would have been sustained. In the well-known case of the throwing of a squib, which was picked up and thrown by two other persons before it committed the injury on the plaintiff, it was held that the first thrower was responsible; that the new direction and force flowed out of the first force, and was not a new trespass. So, here the act of Lartigue directly flowed from the original fault of the defendant; was occasioned by it, and must be considered as making a part of it. I think the plaintiff has made out his case, under the law cited at the commencement of this opinion, and that the judgment of the parish court should be affirmed, with costs.

Martin, J. Nothing can be clearer than the position, that a person who, in this state, deals with a black man, exposes himself, in case of his being a slave, to all the consequences which follow the dealing with a slave; the presumption being, that a black man is a slave; as by far the greatest proportion of persons of that color are, in this state, held in slavery. There would be no possibility of punishing illegal acts relating to that species of property, if the knowledge of the actual slavery of the negro was essentially to be proven in the trespass.

The liquor which intoxicated the slave, having been furnished him in the defendant's shop, he must be amenable for the consequences. It is clear, that the spirituous liquor which the plaintiff's slave obtained there was the cause of his intoxication; as it appears in evidence that he proceeded from the shop to the boat, and that a short time after he fell in the water, and was drowned. It appears to me, that the drowning was the immediate consequence of the supply of spirits procured in the defendant's shop; he must,

of course, abide the consequence. I concur in Judge Porter's opinion.

Mathews, J. I concur with my colleagues. Judgment affirmed.

2.

STATE v. ANONE. May T. 1819. 2 Nott & M'Cord's Rep. 27.

Indictment for trading with a slave without a ticket. It appeared the defendant left one of his slaves in his store to buy and sell for him in his absence. The overseer of a plantation suspecting the defendant's slave of buying of slaves without tickets, gave corn to one of the slaves, who sold to the defendant's slave for his master in the presence of the overseer. It was objected, the defendant could not be convicted, in as much as the corn was given by the overseer to the negro for the purpose of detecting the defendant.

Entrapping a party trading with a slave will not affect the validity of the conviction.

The court, *Richardson, J.*, held, that where the goods were given by the master or owner on purpose to entrap the person who might trade with the slave, and where the master or owner stood and saw the act of trading for the purpose of detection, it does legalize such; nor is it a defence which will avail the defendant. The same principle was laid down in the State v. Stroud, in a note to the end of the case in the text.

3.

THE STATE v. PEMBERTON and SMITH. Dec. T. 1829.

2 Devereux's North Carolina Rep. 281.

The defendants were indicted as follows: "The jurors, &c. present, that S. P. and J. A. S. late of, on, &c., at, &c., unlawfully did play at cards with certain slaves, to wit, with, &c., to the evil example of all others in like case offending, and against, &c."

It is not an offence either at common law or by statute to gamble with slaves

After verdict for the state, his honor Judge Strange arrested the judgment, being of opinion, that the fact charged as an offence was one which never could have existed in England, and therefore could not be deemed an offence at common law, as no law could be supposed to exist against that which could not be done. And as there was no statute prohibiting it; or, if there was, as the indictment did not conclude *contra formam*, it could not be taken as an offence against the statute law. From this judgment the solicitor for the state appealed.

Per Cur. For the reasons given by the judge below, the judgment must be affirmed.

(XXIV.) HARBORING SLAVES.*

1.

SCIDMORE v. SMITH. Aug. T. 1816. 13 Johns. Rep. 322.

An action
on the
case lies
for harbor-
ing a slave.

Smith, the defendant in error, brought an action of *trespass* in the court below, against the plaintiff in error, to recover damages for seducing and harboring his man servant. It was objected that the action should have been *debt*, under the 15th section of the "act concerning slaves and servants." (2 N. R. L. 206.,) but the exception was overruled, and judgment was given for the defendant in error.

Per Cur. The statute penalty for harboring slaves or servants is cumulative, and does not destroy the common law remedy. Judgment affirmed.

*By Aiken's Ala. Dig. p. 109, any person harboring or concealing any negro or negroes belonging to any other person, or suffering the same to be done (with his consent and knowledge,) shall be punished in a sum not exceeding \$700, and shall be imprisoned not less than one, nor exceeding six calendar months; and by Prince's Dig. Laws of Geo. p. 375, any person guilty of harboring, &c. to be sentenced to the penitentiary, at hard labor, for a term not exceeding 2 years, provided, an apparent well founded claim to said slave is not shown on trial; damages may also be recovered in a civil suit for loss of labor, &c. And by the Rev. Code of Miss. p. 585, any white person, free negro, or mulatto, harboring or entertaining a slave without the consent of his or her owner or overseer, shall forfeit to the informer, for every such offence, \$10; and if a free negro, or mulatto, shall, in addition, receive any number of lashes, not exceeding thirty. *Ib.* p. 318, any licensed innkeeper harboring a slave knowing him to be such, without a written permission from the master or mistress, shall forfeit and pay for every such offence, a sum not less than \$10, nor more than \$50; and in p. 584, a slave harboring, &c. another slave, shall be punished by stripes not exceeding thirty-nine. By the Rev. Code of Miss. p. 380, any white person, negro, or mulatto, harboring a slave without the consent of the master, shall be fined in a sum not exceeding \$20, and shall be liable in damages to the owner; and any slave committing a like offence, to receive not exceeding thirty-nine lashes. By the Rev. Code of Virginia p. 439, any free person guilty of, &c. shall be considered guilty of a misdemeanor, and punishable as in other cases of misdemeanors, and shall also be liable for damages to the party injured: if a slave, to receive not exceeding thirty-nine lashes. By the Rev. Code of Tenn. vol. 1. p. 329, any white person, free negro, or mulatto, harboring or enticing a slave, without the knowledge and consent of the master, shall forfeit, &c. a sum not exceeding \$20, nor less than \$10; *Ib.* p. 320, for harboring, &c. a slave on any pretence whatever, shall forfeit and pay to the owner, for every such offence, \$50, and be also liable in an action for damages to the owner; and if the offence is committed with a view to the escape of the slave from the state, shall pay to the master or mistress, for every such negro enticed away, \$62 and 50 cents, to be levied on his property; but if he be insolvent, shall be compelled to serve the owner 5 years. By

2.

DARK v. MARSH. July T. 1815. 2 North Carolina Law Repository 249.

This was an action of debt to recover the penalty under the 4th section of the act of 1791, against harboring slaves. The declaration contained three counts: 1. For enticing and persuading the slave to leave the plaintiff's service. 2. For harboring and maintaining the slave, knowing her to be a runaway. The jury found a verdict for the plaintiff, subject to the opinion of the court, on the following case. The plaintiff proved a title to the two slaves, mother and child, under a bill of sale, and possession of them from February 1807, until the September following, when she absented herself with her child, in the night time, taking with her all her apparel, and was the next morning in possession of the defendant, who at that time, gave notice to the plaintiff of the fact, and said he should retain them until recovered by law; as he claimed them as his father's property. The defendant has had them in possession till 1813, harboring and maintaining them, but in an open and avowed manner, the woman being the wife of one of his negro men. The plaintiff sued out a writ of detinue for the slaves in 1807, and in September 1813, recovered them, and damages for the detention. The writ in the present action was sued out in 1809.

Harboring and maintaining a runaway slave within the meaning of the 4th section of the act of 1791 of North Carolina means a secret and fraudulent harboring and maintaining

Per Cur. Seawell, J. The jury have found for the defendant

the act of 1836, any person or persons, harboring, &c. any runaway slave, knowing him to be such, shall, on conviction, be punished by imprisonment in the penitentiary, at hard labor, for a period not exceeding 10, nor less than 3 years. In Kentucky, by the act of 1830, p. 173, any person concealing or harboring a runaway slave, knowing him to be such, in addition to compensation to the owner, shall, on conviction, pay a fine not exceeding \$500, nor less than \$50, and also give security for good behaviour during his stay in the state. By Lislet's Louisiana Dig. vol. 1, p. 121. any person harboring, concealing, or hiring any runaway slave, shall be fined in a sum not exceeding \$300, nor less than \$100; *Ib.* p. 398, any person harboring, &c. knowing them to be such, &c. shall, on conviction, be fined in a sum not exceeding \$1000, nor less than \$200, and be imprisoned not exceeding 2 years, nor less than 6 months. By 2 Brevard's Dig. Laws of South Carolina, p. 237., any free negro, mulatto, mestizo, or slave, guilty of harboring, &c. a runaway slave or slaves, charged or accused of any criminal matter, if a slave, shall receive such corporal punishment, not extending to life and limb, as the court shall think fit; and if a free negro, &c. shall forfeit to the use of the owner, £10 for the first day, so harbored or concealed, and £1 for every day after; and if unable to pay said forfeiture, shall be publicly sold to pay the same. *Ib.* p. 257. harboring any negro illegally brought into the state, shall forfeit and pay \$100, for every such offence.

on all the counts in the declaration, except the one for *harboring* and *maintaining* the slave as a runaway. Upon that count we think there can be no doubt as to what verdict they should have found, under the facts which form the case. The act of assembly gives a penalty, where any person shall "harbor or maintain under any pretence whatever, any runaway servant or slave."

Now, it has been contended by the plaintiff's counsel, that if the slave was a runaway, and was in the possession of defendant, and retained by him, that it was then such a case as was provided for by the act, which from the words, "under any pretence," would reach every possible case. That the legislature was competent to give a penalty in such a case, we do not deny, but feel warranted in saying they have not *said* so, or *intended* it, in this case.

The act has in *express* words given a penalty for *harboring*;—harboring is a term well understood in our law, and means a *fraudulent* concealment; and the legislature not having said in what a *maintaining under any pretence* consists, we are left to find it out by construction. To us it seems clear, that it is a safe rule in construction, where acts of a known and definite meaning are described as constituting an offence, and then other words of a general nature are used as synonymous with the former, and apparently with a view of giving the act a liberal construction in suppression of the mischief, that these *general* expressions should not render penal by construction, any act which does not partake of the *qualities* of the act *specially* set forth. Such a construction would lead us to say, that the maintaining, intended by the legislature, was *secret* and *fraudulent*; this being negatived by the statement of the case, we think the jury should have found for the defendant on this count, and are all of opinion there should be judgment for defendant.

3.

GORDON, by his next friend v. FARQUHAR. June T. 1823. Peck's Tennessee Rep. 155.

Harboring a slave if done under a claim of property, and not with a view to subtract profits from the

Per Cur. Haywood, J. This was a warrant in debt, before a justice of the peace, for fifty dollars, founded on the act of 1799, ch. 28, sec. 2, for enticing and persuading a certain slave named Violet, from the service of the plaintiff, her master. The cause went into the circuit court by appeal, where there was a trial and verdict for the defendant. The clause in the act on which the

warrant was founded, declares "that if any person shall hereafter entice or persuade any servant or slave to absent him or herself from his or her owner's service, or shall harbor or maintain under any pretence whatever."

owner,
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On the trial it appeared, that the defendant met with the slave, who was absent under a pass or permit from the plaintiff, who claimed to be the owner under a purchase at sheriff's sale, and claiming an interest in the slave under a deed of trust, which deed was held by Tubb as trustee; he directed the slave to go to Tubb, who he said had a claim to her, under which direction the slave went.

The deed of trust was shown in defence, but it was insisted it was fraudulent, and should be viewed as a nullity. No part of the charge of the court is called in question, so far as it goes, but it is insisted that the judge should have charged the jury, that if the defendant claimed the girl by a deed fraudulent and void in law, he could not, by virtue thereof, justify persuading and enticing her from her owner's service. But the court, though requested, refused so to charge, having charged "that though the defendant might have persuaded her to put herself under the protection of Tubb; yet, if he did it under a belief that he had a good equitable or a legal title in Tubb, then he is not embraced in the act of assembly."

The words, "under any pretence whatever," in the act of assembly, are referable to the harboring, not to the words "*entice from the service of the owners*;" this latter sentence means an acknowledged owner, not one whose claim is opposed by that of the defendant, by virtue of another claim of his own. If the prior possession is to be regarded, and he who is the owner with open possession is not to be disturbed, then a new possession taken by force and avowedly as a recaption, is not the object of the penalty awarded by this law, for that is but a restitution to the state, from which it ought not to have been taken, and one which is effected without force, and not without a justificatory motive. The penalty is to be recovered before a justice of the peace, and certainly it cannot be pretended that the justice must decide on the merits of the respective claims, of course he cannot determine whether one of the claims be fraudulent or not. He can only enquire into the motive of the person charged, and whether it be such as the act condemns, that is, a desire to meddle with the property of another, to which the defendant had himself no colera-

ble claim, and to subtract from the owner, profits which the offender has no reason or pretence for claiming.

4.

ROQUET v. RICHARDSON. March T. 1832. 3 Louisiana Rep. 452.

A person who holds possession of a slave without right or title, altho' his motives be not criminal, is liable for expenses, to which the owner is put to recover the slave.

Damages were claimed from the defendant, on the ground of having concealed and employed a runaway slave belonging to the plaintiff. The general issue was pleaded, and it appeared from the testimony, that a female slave aged about twelve years, was brought to the defendant's house by a carman, to whom she had stated she was free. She remained with the defendant for nearly a year, during which time every publicity was given to the fact of her living there, and attempts made to discover whether she was a slave, and to whom she belonged. There was no paper published in the parish where the defendant resided; nor did it contain a jail;—it was further shown that the defendant was a justice of the peace. The plaintiff proved property in the slave; that he had advertised her in the papers of New Orleans as a runaway, and expended one hundred dollars in endeavoring to recover her. There was judgment for the defendant in the court below, and the plaintiff appealed.

Per Cur. Mathews, J. In this case, damages are claimed from the defendant, on account of the concealment and detention of a female slave, the property of the plaintiff. The court below rendered judgment in favor of the former, from which the latter appealed. The amount claimed is in conformity with the acts of the legislature, (part of the Black Code,) passed in 1807 and 1809, and which relate to the penalty and punishment for harboring and concealing runaway slaves. These acts seem intended to fix the penalties to which offenders against their provisions may be legally subjected on conviction; they are pecuniary, but may be changed into imprisonment, if the persons convicted has not the means necessary to pay to owners of slaves the compensation accorded. See, Moreau's Dig. p. 119–20. In addition to the compensation allowed to owners, by the first article, a fine is imposed for the benefit of the parish, wherein the offender may be convicted, by the second. *Same book*, p. 121. These laws are evidently penal, and have relation to public offences. Whether the owner of a slave, which may have been concealed or hired without leave, can pursue the person offending, in a civil action, and on proof of the

offence recover the penalty prescribed by law ? is a question which the present case (according to the testimony,) does not require to be settled, as we are of opinion with the court below that the proof does not establish any criminal concealment or illegal hiring against the defendant. The petition contains a claim for damages to the amount of one hundred dollars, exclusive of the penalty fixed by law. The testimony is somewhat contradictory as to the value of the services of the slave. She is a girl about twelve years of age, and if healthy, her work and labor must be presumed to be worth something. Be this, however, as it may, it is in evidence that one hundred dollars were paid by the husband of the plaintiff, in recovering possession of this slave. Although the conduct of the defendant, as shown by the proof of the cause, cannot be held as criminal, yet viewed either as an individual or a justice of the peace, there is such remissness and negligence on his part, as ought to subject him to all loss and damages actually suffered by the plaintiff in relation to her property, of which he had possession, without right or title. Judgment reversed.

5.

STRAWBRIDGE v. TURNER, et al. March T. 1836. 9 Louisiana Rep. 213.

This was an action brought by the plaintiff to recover from the defendants, owners of the steamboat Chesapeake, the value of a slave alleged to have been illegally employed by the captain of the boat as a hand, without the authority or consent of the plaintiff ; and while in this service was drowned.

Per Cur. Martin, J. The plaintiff claims the value of a slave, employed as a hand on board the steamboat Chesapeake, by the defendants, without his authority or consent, and who was drowned by jumping or falling overboard. This case was before this court last year, and remanded for a new trial. See 8 Louisiana Reports 537.

After the cause was remanded, and before the second trial, the plaintiff amended his petition, by the addition of an averment, that the defendants, by due diligence, might have prevented the slave being employed as a hand. The parties went to trial on this additional allegation to the former cause of action. There was a second verdict and judgment for the plaintiff, and the defendants appealed.

The fact of the slave being employed as a hand on board the

Where the owners of a steamboat suffered a slave to be employed as a hand on board, by the captain, without the authority and consent of his master, and he was accidentally drowned, held, that the owners of the boat were responsible for his value.

steamboat, was fully proved. It further appears, that the plaintiff on hearing his slave was on board, went there with the intention of arresting him, and in the attempt, the boy, in endeavoring to effect his escape, fell overboard, and was drowned.

The defendant's counsel, urged with some earnestness in the argument of the case, that the hiring and employment of the slave was not the immediate cause of the drowning; but that it was occasioned immediately by the pursuit of the master.

The plaintiff on the other hand, produced evidence which shows clearly the want of due diligence in the owners of the steamboat, in suffering the slave in question to be engaged for several days in unloading and loading her in the city of New Orleans, where they resided. This they could have prevented and did not. The plaintiff has had two verdicts in his favor. His slave absconded, and went on board the steamboat in an illegal and improper manner. He was illegally and without authority hired by the master, of which fact the jury seem to have believed the owners had notice. It does not appear that they made any inquiry whether he was employed on board with or without the knowledge and consent of the plaintiff, his master. The verdict must therefore stand, and remain undisturbed.

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